DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 13-551	
Title:	Robert R. Tolan, Petitioner v. Jeffrey Wayne Cotton
Docketed:	November 1, 2013
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Nos.:	(12-20296)
Decision Date:	April 25, 2013
Rehearing Denied:	August 1, 2013

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Oct 29 2013	Petition for a writ of certiorari filed. (Response due December 2, 2013)
Nov 4 2013	Waiver of right of respondent Jeffrey Wayne Cotton to respond filed.
Nov 20 2013	DISTRIBUTED for Conference of December 6, 2013.
Nov 26 2013	Response Requested . (Due December 26, 2013)
Dec 19 2013	Brief of respondent Jeffrey Wayne Cotton in opposition filed.
Dec 26 2013	Motion for leave to file amicus brief filed by NAACP Legal Defense and Educational Fund, Inc.
Jan 8 2014	DISTRIBUTED for Conference of January 24, 2014.
Jan 8 2014	Reply of petitioner Robert R. Tolan filed. (Distributed)
Jan 24 2014	Record Requested .
Jan 27 2014	Record received from U.S.C.A. 5th Circuit. The record is electronic.
Jan 27 2014	Record received from U.S.D.C. Southern District of Texas. The record is electronic.
Feb 10 2014	DISTRIBUTED for Conference of February 21, 2014.
Feb 12 2014	Record received from U.S.D.C. Southern District of Texas (2 boxes).
Feb 24 2014	DISTRIBUTED for Conference of February 28, 2014.
Mar 3 2014	DISTRIBUTED for Conference of March 7, 2014.
Mar 10 2014	DISTRIBUTED for Conference of March 21, 2014.
Mar 24 2014	DISTRIBUTED for Conference of March 28, 2014.
Mar 31 2014	DISTRIBUTED for Conference of April 4, 2014.
Apr 7 2014	DISTRIBUTED for Conference of April 18, 2014.
Apr 7 2014	DISTRIBUTED for Conference of April 18, 2014.
Apr 21 2014	DISTRIBUTED for Conference of April 25, 2014.
Apr 28 2014	DISTRIBUTED for Conference of May 2, 2014.
May 5 2014	Motion for leave to file amicus brief filed by NAACP Legal Defense and

	Educational Fund, Inc. GRANTED.
May 5 2014	Petition GRANTED. Judgment VACATED and case REMANDED. Opinion per curiam. Justice Alito, with whom Justice Scalia joins, concurring in the judgment. (Detached Opinions)
Jun 6 2014	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

13- 551

No. ____

In the Supreme Court of the United States

ROBERT R. TOLAN,

Petitioner,

v.

JEFFREY WAYNE COTTON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

George R. Gibson
NATHAN SOMMERS JACOBS
2800 Post Oak Boulevard
61st Floor
Houston, Texas 77056
(713) 892-4843
Ggibson@nathansommers.com

Martin J. Siegel
Counsel of Record
LAW OFFICES OF
MARTIN J. SIEGEL, P.C.
Bank of America Center
700 Louisiana Street
Suite 2300
Houston, Texas 77002
(713) 226-8566
Martin@siegelfirm.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

The Court's decisions have established a two-pronged test for a government official's claim to qualified immunity: (i) whether the official violated a constitutional right, and (ii) whether the right was clearly established in the specific context involved. In Fourth Amendment cases, the first prong asks whether the search or seizure was reasonable in light of the factual circumstances confronting the officer, while the second asks whether the search was reasonable under governing law. Both prongs involve reasonableness, but the Court has cautioned that they remain analytically distinct. Yet some lower courts, including the Fifth Circuit, bifurcate the second prong and separately ask whether the defendant's conduct was objectively unreasonable. This can result in factual reasonableness being considered in the second prong analysis though it is supposed to constitute the first prong test, as occurred here. The circuits are divided on whether this approach complies with the Court's precedents. *See, e.g., Walczyk v. Rio*, 496 F.3d 139, 166 (2007) (Sotomayor, J., dissenting).

Accordingly, the question presented is whether courts deciding qualified immunity in Fourth Amendment cases should consider the factual reasonableness of the search or seizure when applying the second, "clearly established" prong of the test.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 5

A. Officer Jeffrey Cotton's Shooting of Robbie Tolan 5

B. The Decisions Below 8

REASONS FOR GRANTING THE PETITION ... 10

I. The Fifth Circuit's Decision Transforms the Second Prong of Qualified Immunity By Injecting Factual Reasonableness Into The Inquiry 10

II. Circuit Courts Are Divided in How They Define and Apply the Second Prong of Qualified Immunity 13

III. The Court Should Resolve the Confusion Surrounding Consideration of Factual Unreasonableness in the Qualified Immunity Analysis 19

IV. The Fifth Circuit's Decision is Erroneous . . 25

CONCLUSION 27

APPENDIX

Appendix A Opinion in the United States Court of Appeals for the Fifth Circuit (April 25, 2013) . . . . . App. 1

Appendix B Amended Final Summary Judgment in the United States District Court, Southern District of Texas, Houston Division (April 30, 2012) . . . . . App. 20

Appendix C (Corrected) Memorandum and Order on Jeffrey Wayne Cotton's and John C. Edwards's Motion for Summary Judgment in the United States District Court, Southern District of Texas, Houston Division (March 31, 2012) . . . . . App. 22

Appendix D On Petition for Rehearing En Banc in the United States Court of Appeals for the Fifth Circuit (August 1, 2013) . . . . . App. 91

Appendix E Transcript Excerpts

Excerpts of Direct Examination of Robbie Tolan, in the District Court of Harris County, Texas, 232nd Judicial District
(May 6, 2010) . . . . . App. 100

Excerpts of Robbie Tolan Deposition Transcript
(October 26, 2010) . . . . . App. 102

Excerpts of Jeffrey Cotton Deposition Transcript
(November 15, 2010) . . . . . App. 104

Excerpts of Direct Examination of Marian Tolan, in the District Court of Harris County, Texas, 232nd Judicial District
(May 6, 2010) . . . . . App. 105

TABLE OF AUTHORITIES

CASES

Abraham v. Raso,
183 F.3d 279 (3d Cir. 1999) 23

Anderson v. Creighton,
483 U.S. 635 (1987) 20

Ashcroft v. Al-Kidd,
131 S. Ct. 2074 (2011) 11

BMW of North America, Inc. v. Gore,
517 U.S. 559 (1996) 22

Bailey v. Pataki,
708 F.3d 391 (2d Cir. 2013) 14

Baker v. Putnal,
75 F.3d 190 (5th Cir. 1996) 27

Brosseau v. Haugen,
543 U.S. 194 (2004) 10, 27

Bunting v. Mellen,
541 U.S. 1019 (2004) 21

Camreta v. Greene,
131 S. Ct. 2020 (2011) 21

CarePartners LLC v. Lashway,
545 F.3d 867 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2382 (2009) 16

County of Sacramento v. Lewis,
523 U.S. 833 (1998) 24

Cowan v. Breen,
352 F.3d 756 (2d Cir. 2003) 18

Crawford-El v. Britton,
523 U.S. 574 (1998) 20

Curley v. Klem,
499 F.3d 199 (3d Cir. 2007) 17, 18, 24

Dunigan v. Noble,
390 F.3d 486 (6th Cir. 2005) 16

Elder v. Holloway,
510 U.S. 510 (1994) 12

Estate of Escobedo v. Bender,
600 F.3d 770 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 463 (2010) 18

Estate of Sorrells v. City of Dallas,
45 Fed. Appx. 325, 2002 WL 1899592 (5th Cir.), *cert. denied*, 537 U.S. 1072 (2002) 13

Felton v. Polles,
315 F.3d 470 (5th Cir. 2002), *overruled on other grounds, Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) 13

Gonzalez v. City of Schenectady,
728 F.3d 149 (2d Cir. 2013) 14

Gould v. Davis,
165 F.3d 265 (4th Cir. 1998) 18

Graves v. Zachary,
277 Fed. Appx. 344 (5th Cir. 2008) 27

Grawey v. Drury,
567 F.3d 302 (6th Cir. 2009) 15

Hare v. City of Corinth,
135 F.3d 320 (5th Cir. 1998) 8, 12, 13

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 20

Hensley v. Gassman,
693 F.3d 681 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1800 (2013) 15

Higgins v. Penobscot County Sheriff's Dept.,
446 F.3d 11 (1st Cir. 2006) 24

Holzemer v. City of Memphis,
621 F.3d 512 (6th Cir. 2010) 15

Johnson v. Jones,
515 U.S. 304 (1995) 11, 12

Jones v. United States,
527 U.S. 373 (1999) 22

Kovacic v. Cuyahoga County Dept. of Children and Family Serv.,
724 F.3d 687 (6th Cir. 2013) 16

LaMont v. New Jersey,
637 F.3d 177 (3d Cir. 2011) 18

Maldonado v. Fontanes,
568 F.3d 263 (1st Cir. 2009) 16

Mitchell v. Forsyth,
472 U.S. 511 (1985) 11, 12

Morrison v. Bd. of Trustees Of Green Twp.,
583 F.3d 394 (6th Cir. 2009) 16

Ortiz v. Jordan,
131 S. Ct. 884 (2011) 12

Palmer v. Johnson,
193 F.3d 346 (5th Cir. 1999) 13

Pearson v. Callahan,
555 U.S. 223 (2009) 12, 20, 27

Quigley v. Tuong Vinh Thai,
707 F.3d 675 (6th Cir. 2013) 15

Reyes v. Bridgwater,
362 Fed. Appx. 403 (5th Cir. 2010) 27

Russo v. City of Bridgeport,
479 F.3d 196 (2d Cir.), *cert. denied*, 552 U.S. 818
(2007) 15

Sample v. Bailey,
409 F.3d 689 (6th Cir. 2005) 16

Saucier v. Katz,
533 U.S. 194 (2001) ..... *passim*

Scott v. Harris,
550 U.S. 372 (2007) 5, 11

Spaziano v. Florida,
468 U.S. 447 (1984) 22

Taravella v. Town of Walcott,
599 F.3d 129 (2d Cir. 2010) 14, 15, 16, 20

Tarver v. Edna,
410 F.3d 745 (5th Cir. 2005) 13

Tennessee v. Garner,
471 U.S. 1 (1985) 10, 26, 27

Torres v. City of Madera,
648 F.3d 1119 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1032 (2012) 17

Walczyk v. Rio,
496 F.3d 139 (2007) ..... *passim*

Zalaski v. City of Hartford,
723 F.3d 382 (2d Cir. 2013) 15

CONSTITUTION

U.S. Const. amend. IV ..... *passim*

U.S. Const. amend. VII 22

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 2, 3, 8

OTHER AUTHORITIES

Akil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131 (March 1991) 22

PETITION FOR A WRIT OF CERTIORARI

Robbie Tolan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 713 F.3d 299 and reprinted at Appendix A. The opinion of the district court is reported at 854 F. Supp. 2d 544 and reprinted at Appendix C. The opinion of Judges James L. Dennis and James E. Graves dissenting from the court's denial of rehearing en banc is reported at __ Fed. Appx. __, 2013 WL 3948950, and reprinted at Appendix D.

JURISDICTION

The court of appeals denied rehearing en banc on August 1, 2013. App. D. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

> place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

INTRODUCTION

In 2008, a Bellaire, Texas police officer named Jeffrey Cotton shot Robbie Tolan while Tolan was on his knees on his own front porch. Cotton suspected Tolan of car theft because another officer had incorrectly entered Tolan's license plate number in a computer, yielding an erroneous match with a stolen vehicle. Cotton arrived on the scene and, within a few seconds, slammed Tolan's mother into the Tolans'

garage door without provocation. This prompted Tolan, who was unarmed, to exclaim "get your fucking hands off my mom" and start to rise from the ground where he had been laying as ordered. Cotton then turned to face Tolan, drew his pistol, and shot Tolan in the chest. He claimed Tolan looked like he was reaching for a gun in his waistband, though Tolan testified he made no such gesture but merely started to stand up.

A state grand jury indicted Cotton for shooting Tolan, but he was acquitted at trial. After Tolan brought this suit under 42 U.S.C. § 1983 alleging violation of the Fourth Amendment, the district court dismissed on summary judgment and the Fifth Circuit affirmed. Three judges voted to rehear the appeal en banc and two joined a dissenting opinion from the denial of Tolan's motion for rehearing.

Although the district court held that the shooting did not violate the Fourth Amendment and therefore dismissed under the first prong of qualified immunity, the Fifth Circuit affirmed under the second prong, which asks whether the right allegedly violated was clearly established. But in supposedly applying the second prong, the court actually performed the analysis that constitutes the first prong and decided that Cotton acted reasonably considering the facts of the encounter. This happened because the Fifth Circuit bifurcates the second prong of qualified immunity in Fourth Amendment cases and asks, not only whether the law was clearly established when applied to the facts at hand, but also whether the defendant's conduct was objectively unreasonable in light of that law. This formulation allows lower courts to consider the factual unreasonableness of the search or seizure as part of the

second prong despite this Court's teaching that the two prongs should remain distinct and that factual unreasonableness is part of the first prong. *See Saucier v. Katz*, 533 U.S. 194, 204-06 (2001). Two other circuits also subdivide the "clearly established" prong this way, though panels and judges within those circuits have vigorously disagreed on whether the practice adheres to this Court's precedent.

The Court should grant the petition to resolve the split in how courts interpret the second prong of qualified immunity. Injecting factual unreasonableness into what is supposed to be the purely legal, second prong immunity analysis will result in far fewer decisions resolving the merits of Fourth Amendment claims, and therefore less guidance to officials who need to know the boundaries of constitutionally permissible conduct. It will further diminish the crucial role of juries in establishing what is reasonable under the Fourth Amendment. And as then-Judge Sotomayor recognized when dissenting from the Second Circuit's similarly bifurcated version of the second prong, it will "give defendants a second bite at the immunity apple, thereby thwarting a careful balance that the Supreme Court has struck" in fashioning the doctrine of qualified immunity. *Walczyk*, 496 F.3d at 166 (Sotomayor, J., dissenting). The Court should therefore review this case, reverse the decision below, and permit Tolan's claim to proceed to trial.

STATEMENT OF THE CASE

A. Officer Jeffrey Cotton's Shooting of Robbie Tolan

Because the district court dismissed Tolan's claim on summary judgment, what follows are "the plaintiff's version of the facts." *Scott v. Harris*, 550 U.S. 372, 378 (2007).

Shortly before 2:00 a.m. on December 31, 2008, Tolan and his cousin were driving home from a Jack in the Box restaurant to Tolan's house in Bellaire, Texas, a suburb of Houston. App. 2-3. Tolan was 23 years old at the time. Bellaire police officer John Edwards drove behind Tolan's Nissan Xterra and decided to follow it when Tolan made what Edwards thought was a sudden turn onto a residential side street. *Id.* Several cars in the area had been burglarized the night before. *Id.*

Tolan parked in front of his house. App. 3. As Edwards drove past Tolan's car, he incorrectly typed Tolan's license plate number into his mobile data terminal. *Id.* This produced an erroneous match with a stolen vehicle, though the Tolans actually owned the Xterra. *Id.* Edwards then parked nearby. *Id.* When Tolan and his cousin got out of the Xterra and began walking up the driveway with bags of food, Edwards turned his police cruiser's light on them, got out of his car, pointed his gun and flashlight at the pair, and told them to get down on the ground. *Id.* He also told them he thought Tolan's car was stolen. *Id.*

Tolan and his cousin did not immediately lie down as commanded but instead told Edwards the car

belonged to Tolan and that they lived there. App. 3-4, 101. They did not curse at Edwards, as the panel's opinion recounts, but merely spoke to him. App. 101. Alerted by the commotion in their front yard, Tolan's parents came out of the house in their pajamas and also explained to Edwards that Tolan was their son, that this was their home, and that the car was not stolen. App. 3-4, 97. They instructed their son and cousin to lie down as Edwards had ordered, and both complied. *Id.* Tolan lay on the porch with his arms outstretched facing the front door. App. 4.

A second Bellaire police officer, Jeffrey Cotton, heard Edwards's radio report and drove to the Tolans' home. *Id.* He testified that he thought Edwards was in danger. *Id.* When Cotton arrived, Tolan and his cousin were lying down, Tolan's father was standing in the driveway as ordered by Edwards, and Tolan's mother was talking to Edwards. *Id.* Cotton got out of his car, drew his gun, and approached Edwards, who told him Tolan had gotten out of "the stolen vehicle." *Id.* The scene was illuminated by floodlights over the garage, a lantern in the yard, and Edwards's police car and flashlight. App. 96. The front porch where Tolan was laying was reasonably well-lit. *Id.* Cotton, however, testified that it was "fairly dark." App. 4.

Cotton saw Tolan's mother walking in front of and talking to Edwards and told her to move aside. She responded, "Me? Are you kidding me? We've lived here 15 years. We've never had anything like this happen." App. 41. She also calmly told Cotton that the Xterra was not stolen, that the family lived there, and that

Tolan was their son. App. 30, 96. Cotton holstered his gun, grabbed Tolan's mother's right arm, and slammed her into the garage door. App. 30-31, 96.

Reacting to the sound of his mother hitting the door, Tolan exclaimed "get your fucking hands off my mom" and started to rise. App. 5-6. In order to stand, he pulled his arms back toward his chest and pushed up. *Id.*, App. 32. He began to turn and get up "pretty quickly," but as he testified: "I didn't jump up off the ground. I just simply got up. Started to get up." App. 75. "Before I could stand up, I was shot." *Id.* "I didn't run at him. I didn't jump up and make any crazy movements," Tolan explained. App. 102.

"Without issuing any warning, Cotton unholstered his weapon, pointed it at [Tolan] and shot at him three times, striking him once in the chest." App. 98. He was 15-20 feet away from Tolan, who was unarmed. App. 5-6. Tolan testified that he was on his knees when he was shot and had not made any gesture toward or away from his midsection or waist. App. 76, 98. Cotton and Edwards testified that Tolan was in a crouching position and poised to charge, and Cotton stated that he believed Tolan was drawing a gun from his waistband. App. 6, 49-50, 52. Cotton said that he exclaimed "stop" or "no" before shooting, but that this was not said as a warning. App. 104. The Tolans testified that Cotton did not say anything but simply pointed and fired. App. 106. Tolan survived the shooting, though the bullet collapsed his lung and remains lodged in his liver. App. 98. Before he shot Tolan, Cotton had only been on the scene for 32 seconds. App. 6.

B. The Decisions Below

A Harris County, Texas grand jury indicted Cotton for aggravated assault for shooting Tolan, but he was acquitted at trial. App. 6. Tolan sued Cotton under 42 U.S.C. § 1983 for using excessive force in violation of the Fourth Amendment. App. 72. Following discovery, the district court granted summary judgment to Cotton on the ground that the shooting did not violate Tolan's Fourth Amendment rights. App. 72-90.

A panel of the Fifth Circuit affirmed the summary judgment, but on a different ground. App. A. It purported to skip the first prong of qualified immunity relating to the merits of Tolan's Fourth Amendment claim and proceeded directly to the second prong, which it defined "as two separate inquiries":

> whether the allegedly violated constitutional rights were *clearly established at the time of the incident;* and, if so, whether the conduct of the defendants was objectively unreasonable in the light of that then clearly established law.

App. 10 (emphasis in original) (quoting *Hare v. City of Corinth*, 135 F.3d 320, 326 (5th Cir. 1998)). The court concluded Cotton acted reasonably and was therefore entitled to immunity in light of the facts of the situation, such as the mistaken report of a stolen car, Tolan's "verbally threatening [Cotton] and getting up from his prone position," and "surrounding circumstances" including "the late hour; recent criminal activity in the area; a dimly-lit front porch; Marian Tolan's refusing orders to remain quiet and calm; and the Officers' being outnumbered on the

scene." App. 14-15. *Id.* The court also cited testimony from Cotton's use-of-force experts and the fact that Tolan's movement violated Texas law requiring obedience to police officers. App. 15-16.

Tolan petitioned for rehearing en banc, which the court denied. App. D. Three judges voted to rehear the appeal, however, and two dissented from the denial of Tolan's petition in a written opinion. *See id.* In his dissent, Judge Dennis, joined by Judge Graves, explained how the panel misconceived the qualified immunity test:

> the panel opinion, in making a purported second-prong inquiry, fails entirely to assess whether an objective officer in Cotton's position could have made a mistake of law and instead performs what appears to be an erroneous, partial, and distorted *Saucier* first-prong analysis to conclude that summary judgment based on qualified immunity is proper.

App. 95. This led the panel to grant summary judgment despite "genuine issues as to material facts whether Cotton objectively and reasonably feared for his life when he shot to kill Robbie." *Id.* Those factual disputes include how Tolan started to stand and whether he was on his knees, how he used his hands in the moments before he was shot, whether Cotton gave any warning before firing, the level of visibility, how Tolan's mother behaved, and how Cotton handled her. App. 96-98. When the facts are considered in Tolan's favor, the dissent concluded, a jury could readily find

that shooting Tolan was unnecessary and that Cotton violated Tolan's clearly established Fourth Amendment rights. App. 99.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's Decision Transforms the Second Prong of Qualified Immunity By Injecting Factual Reasonableness Into The Inquiry

1. Two questions must be answered when a defendant asserts qualified immunity. The first is: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier*, 533 U.S. at 201. In a Fourth Amendment case like this, officers commit a violation when they use deadly force unreasonably, that is, in the absence of an imminent threat of death or serious injury to themselves or others. *See Brosseau v. Haugen*, 543 U.S. 194, 197-98 (2004); *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985). There is no violation where the officer makes a reasonable but factually incorrect judgment that the plaintiff poses a serious danger: "If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." *Saucier*, 533 U.S. at 205.

The second question asks whether the right the plaintiff alleges to have been violated was clearly established at the time of the incident. *See Saucier*,

533 U.S. at 201. This prong permits dismissal if the officer reasonably misjudged the law rather than the facts:

> An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Saucier, 533 U.S. at 205; *see also Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2085 (2011) ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions"). This inquiry ensures an officer had fair warning his conduct was unlawful before he is found liable or even forced to defend the suit. *See Saucier*, 533 U.S. at 202.

Thus, in a Fourth Amendment case, both prongs of the qualified immunity test require assessing whether the officer acted reasonably. *See id.* at 203-04. But while the first prong is factual and goes to the merits of the plaintiff's claim, the second is legal and assesses the defendant's assertion of immunity. Under the first prong, courts and juries must "slosh [their] way through the factbound morass of 'reasonableness'" to determine whether a seizure violates the Fourth Amendment. *Scott*, 550 U.S. at 383. Under the second, the court confronts "a legal issue that can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case." *Johnson v. Jones*, 515 U.S. 304, 313 (1995) (quoting *Mitchell v.*

Forsyth, 472 U.S. 511, 530 n. 10 (1985)); *accord Ortiz v. Jordan*, 131 S. Ct. 884, 892-93 (2011); *Elder v. Holloway*, 510 U.S. 510, 516 (1994). The two prongs should remain analytically separate, *see Saucier*, 533 U.S. at 204; *Johnson*, 515 U.S. at 312, and courts may choose to resolve the case by addressing only one of them. *See Pearson v. Callahan*, 555 U.S. 223, 236-43 (2009).

2. Rather than apply this Court's precedent defining and distinguishing the two prongs of qualified immunity, the Fifth Circuit jumbles them together and injects merits-related factual reasonableness into the purely legal, second prong immunity analysis. This approach began in a decision predating *Saucier*. In *Hare*, the Fifth Circuit announced that the second prong "is better understood as two separate inquiries." 135 F.3d at 326. The first of these is whether the right at issue was clearly established, while the second is "whether the conduct of the defendants was objectively unreasonable in the light of that then clearly established law." *Id.* By subdividing the second prong this way, the court licensed consideration of factual reasonableness as part of the immunity analysis rather than the merits. In *Hare*, for instance, the court found the defendants immune under the second prong based on the facts of the case rather than any reasonable legal misunderstanding by officials. *See id.* at 329 ("we hold that the undisputed facts, viewed in the light most favorable to the nonmovant, do not constitute objectively unreasonable conduct when applied against the deliberate indifference standard").

Decisions after *Hare* have defined the second prong the same way.[1] And the court repeated the error in this case. The panel's opinion describes what happened, considers whether Cotton could reasonably have felt in "fear for his life," notes that "underlying assumptions" about Tolan turned out "to be erroneous" in hindsight, and calls the shooting a "tragic... mistake of fact." App. 15, 17. This is a first prong analysis about whether the shooting was reasonable in light of the events that occurred on the scene. It has nothing to do with the legal, second prong question whether applicable law was sufficiently settled in this context for Cotton to appreciate that his conduct was unlawful. The court committed this error because it used the circuit's qualified immunity test first enunciated in *Hare*, which predates *Saucier's* clarification of the two different prongs. As the dissent from denial of rehearing en banc correctly puts it, the panel performed "something that it called a second-prong legal analysis but which has all the earmarks of a first-prong fact-intensive inquiry." App. 95.

II. Circuit Courts Are Divided in How They Define and Apply the Second Prong of Qualified Immunity

1. The Fifth Circuit's decision highlights two related divisions in how courts of appeals approach the

---

[1] *See, e.g., Tarver v. Edna*, 410 F.3d 745, 750 (5th Cir. 2005); *Felton v. Polles*, 315 F.3d 470, 477 (5th Cir. 2002), *overruled on other grounds, Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *Estate of Sorrells v. City of Dallas*, 45 Fed. Appx. 325, 2002 WL 1899592 at * 2 (5th Cir.), *cert. denied*, 537 U.S. 1072 (2002); *Palmer v. Johnson*, 193 F.3d 346, 351 (5th Cir. 1999).

second prong of qualified immunity. First, the decision echoes the split among and even within circuits about whether objective unreasonableness should be a separate or third element plaintiffs have to prove to overcome the defense. For example, the Second Circuit is divided about whether the qualified immunity test has two or three prongs, the third resembling the Fifth Circuit's bifurcated scheme and asking, "even if the right was 'clearly established,' whether it was 'objectively reasonable' for the officer to believe the conduct at issue was lawful." *Gonzalez v. City of Schenectady*, 728 F.3d 149, 154 (2d Cir. 2013); *see Bailey v. Pataki*, 708 F.3d 391, 404 n. 8 (2d Cir. 2013) ("There is some tension in our Circuit's cases as to whether the qualified immunity standard is of two or three parts, and whether the "reasonable officer" inquiry is part of step two – the "clearly established" prong – or whether it is a separate, third step in the analysis"); *Taravella v. Town of Walcott*, 599 F.3d 129, 136 (2d Cir. 2010) (Straub, J., dissenting) (collecting two-step and three-step decisions).

Then-Judge Sotomayor pointed out that the Second Circuit's "approach splits the single question of whether a right is 'clearly established' into two distinct steps, contrary to Supreme Court precedent." *Walczyk*, 496 F.3d at 166 (Sotomayor, J., dissenting). As she explained:

> Contrary to what our case law might suggest, the Supreme Court does not follow this 'clearly established' inquiry with a second, *ad hoc* inquiry into the reasonableness of the officer's conduct. Once we determine whether the right at issue was clearly established for the

> particular context that the officer faced, the qualified immunity inquiry is complete.

Id. at 166-67. Other judges on that court have agreed with Justice Sotomayor. *See Taravella*, 599 F.3d at 138 (Straub, J., dissenting) ("we run the risk that lower courts will interpret the third step – the 'objective reasonableness' inquiry – as a hurdle that is somehow distinct from, and in addition to, the 'reasonableness' inquiry that is already a part of the second step"). And some panels have simply ignored the intra-circuit conflict, disregarded the circuit's own precedent, and applied the standard two-pronged test from *Saucier*. *See, e.g., Zalaski v. City of Hartford*, 723 F.3d 382, 388 (2d Cir. 2013); *Russo v. City of Bridgeport*, 479 F.3d 196, 211 (2d Cir.), *cert. denied*, 552 U.S. 818 (2007).

There is analogous division within the Sixth Circuit. Some panels apply a three-part test and ask a third question about reasonableness akin to that employed in the Fifth and Second Circuits: "whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights" *Holzemer v. City of Memphis*, 621 F.3d 512, 519 (6th Cir. 2010). Other decisions note that this third question need only be considered "in some instances" to "increase the clarity of the proper analysis" – leaving it uncertain when and whether the test has two or three parts. *See, e.g., Quigley v. Tuong Vinh Thai*, 707 F.3d 675, 681 n. 2 (6th Cir. 2013); *Hensley v. Gassman*, 693 F.3d 681, 687 n. 5 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1800 (2013). One panel called the third step "redundant" in excessive force cases, *Grawey v. Drury*, 567 F.3d 302, 309 (6th Cir. 2009); another objected to it

as inconsistent with *Saucier*, *see Dunigan v. Noble*, 390 F.3d 486, 491 n. 6 (6th Cir. 2005); but a third disagreed and reaffirmed it. *See Sample v. Bailey*, 409 F.3d 689, 696 n. 3 (6th Cir. 2005). Still other Sixth Circuit panels simply ignore the third question altogether and use the two-pronged *Saucier* formulation. *See, e.g., Kovacic v. Cuyahoga County Dept. of Children and Family Serv.*, 724 F.3d 687, 695 (6th Cir. 2013); *Morrison v. Bd. of Trustees Of Green Twp.*, 583 F.3d 394, 400 (6th Cir. 2009).

Other circuits have also struggled with whether to include a third prong requiring a separate and additional inquiry into objective reasonableness. *See, e.g., Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009) (abandoning three-part test with third question on objective reasonableness in favor of *Saucier's* two-part analysis); *CarePartners LLC v. Lashway*, 545 F.3d 867, 876 n. 6 (9th Cir. 2008) ("We have previously expressed the qualified immunity test as both a two-step test and a three-step test"), *cert. denied*, 129 S. Ct. 2382 (2009). As Second Circuit Judge Straub points out, "the case law is divided, not only in our Circuit, but also in courts around the country. Several circuits have used a three-step analysis, even after the Supreme Court mandated a two-step inquiry in *Saucier*.... [C]ourts have been inconsistent in their treatment of the proper standard for qualified immunity." *Taravella*, 599 F.3d at 138 n. 2 (Straub, J., dissenting).

2. Second, the Fifth Circuit's consideration of factual reasonableness as part of the second prong analysis creates a further split with other circuits. Other courts have sought to maintain *Saucier's* basic

distinction between the merits and immunity. As the Ninth Circuit observed in a recent case: "While the constitutional violation prong concerns the reasonableness of the officer's *mistake of fact*, the clearly established prong concerns the reasonableness of the officer's *mistake of law*." *Torres v. City of Madera*, 648 F.3d 1119, 1127 (9th Cir. 2011) (emphasis in original), *cert. denied*, 132 S. Ct. 1032 (2012). Qualified immunity did not apply in that case because "there could be no reasonable mistake that [the officer's] use of force was proscribed by law." *Id.* at 1128.

Similarly, the Third Circuit considered a case where the district court asked the jury whether the officer's "mistake in firing his weapon [was] objectively reasonable." *Curley v. Klem*, 499 F.3d 199, 204 (3d Cir. 2007). When the jury answered affirmatively, the court held that the officer enjoyed qualified immunity. *See id.* at 204-05. The Third Circuit affirmed but held that the district court erred in considering the jury's objective reasonableness answer to determine immunity; "the question as framed actually pertains to whether there was any constitutional violation at all." *Id.* at 211. As the court explained:

> The immunity step of the *Saucier* test is typically focused on established legal standards and requires a review of relevant case law, a review a jury simply cannot undertake. However, the constitutional analysis focuses on the factual circumstances of the incident and asks whether the officer made a reasonable mistake of fact. Question Three did exactly that. It asked not whether Trooper Klem made a

> mistake of law – wrongly believing that it was legal to shoot the wrong person – but whether it was reasonable for him to make the factual mistake of believing Officer Curley was the armed and dangerous Bailey.

Id. at 214 (citations omitted). This view of qualified immunity follows *Saucier* precisely but differs completely from the Fifth Circuit's treatment of factual reasonableness as part of the second prong evaluation. *See also LaMont v. New Jersey*, 637 F.3d 177, 185 (3d Cir. 2011) ("In short, the dispute in this case is about the facts, not the law. The doctrine of qualified immunity is therefore inapposite").

Other circuits have also maintained the proper division between the two prongs. *See, e.g., Estate of Escobedo v. Bender*, 600 F.3d 770, 779 n. 3 (7th Cir. 2010) (objective reasonableness of officers' tactics in using force relates to first prong of qualified immunity analysis, not second), *cert. denied*, 131 S. Ct. 463 (2010); *Cowan v. Breen*, 352 F.3d 756, 762 (2d Cir. 2003) ("if the analysis focuses on whether an officer made a reasonable mistake of fact that justified his conduct, what is being examined is whether there was a constitutional violation, not whether the officer is entitled to qualified immunity"); *Gould v. Davis*, 165 F.3d 265, 273 (4th Cir. 1998) ("The question in qualified immunity is not whether the officers acted 'reasonably' in the sense in which that term is used in tort law. The question is whether a reasonable person would have known about controlling law, once that law is deemed to have been clearly established under the second prong"). The Fifth Circuit's decision illustrates how subdividing the second prong to require separate proof

of objective unreasonableness leads to the misapplication of the test for qualified immunity, giving rise to a further circuit split.

III. The Court Should Resolve the Confusion Surrounding Consideration of Factual Unreasonableness in the Qualified Immunity Analysis

There are four important reasons to address the division and uncertainty over how lower courts account for factual unreasonableness when deciding qualified immunity.

First, then-Judge Sotomayor has explained how subdividing the second prong and considering reasonableness as a separate component or as a third question altogether alters the balance struck by the qualified immunity doctrine and makes it unduly difficult for plaintiffs to recover for constitutional violations. As she wrote when dissenting from the Second Circuit's practice of treating reasonableness as a separate third step:

> I recognize that the distinction I am drawing is a fine one, but I believe it has real consequences. Our approach does not simply divide into two steps what the Supreme Court treats singly, asking first, whether the right is clearly established *as a general proposition*, and second, whether the application of the general right *to the facts of this case* is something a reasonable officer could be expected to anticipate. Instead, we permit courts to decide that official conduct was "reasonable" even after finding that it

> violated clearly established law in the particularized sense. By introducing reasonableness as a separate step, we give defendants a second bite at the immunity apple, thereby thwarting a careful balance that the Supreme Court has struck "between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties."

Walczyk, 496 F.3d at 168-69 (Sotomayor, J., dissenting) (emphasis in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)).

This Court has long recognized that, "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Crawford-El v. Britton*, 523 U.S. 574, 591 (1998) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)). But repeating consideration of factual reasonableness when resolving the second prong – giving defendants the "second bite at the immunity apple" then-Judge Sotomayor described – risks immunizing unconstitutional behavior even when the defendant should have known what the law demanded in the situation at hand. It also places a thumb on the scale in favor of the defendant by erecting an extra and wholly unnecessary hurdle for the plaintiff. *See Taravella*, 599 F.3d at 138 (Straub, J., dissenting)

Second, considering factual reasonableness when analyzing immunity rather than the merits will slow the development of Fourth Amendment law. Although *Pearson* permits lower courts to skip the first prong,

confronting that step in appropriate cases remains essential. When a court considers the first prong, finds a violation, but then confers immunity under the second prong, it "says 'Although this official is immune from damages today, what he did violates the Constitution and he or anyone else who does that thing again will be personally liable.'" *Camreta v. Greene*, 131 S. Ct. 2020, 2029 (2011). Such rulings "promote clarity – and observance – of constitutional rules" in the future, just as repeated avoidance of constitutional questions through immunity "threatens to leave standards of official conduct permanently in limbo." *Id.* at 2030-31. "Qualified immunity thus may frustrate the development of constitutional precedent and the promotion of law-abiding behavior." *Id.* at 2031 (citations and quotations omitted); *see also Bunting v. Mellen*, 541 U.S. 1019, 1024 (2004) (Scalia, J., dissenting from denial of certiorari).

The danger of excessive constitutional avoidance in Fourth Amendment cases rises considerably if lower courts can decide factual reasonableness as part of the legal immunity inquiry. Whether a search or use of force was reasonable in light of the facts of the incident determines the merits of a Fourth Amendment claim. If that question is shunted into the second prong intended to resolve immunity, as the Fifth Circuit framework encourages and as occurred in this case, courts will have even fewer occasions to examine specific law enforcement practices and decide whether they comply with the Constitution. Fewer cases will serve the valuable purpose of developing constitutional precedent and promoting law-abiding behavior among officers who depend on specific guidance from the courts. More disputes on the merits will be decided

under the guise of determining immunity. The first prong, created to sort out the facts of the case and set the constitutional boundaries governing official action, will have little to do if the Fifth Circuit's approach stands.

Third, importing factual reasonableness into the immunity prong will diminish the vital role juries play in establishing what is reasonable under the Fourth Amendment. Juries represent the "conscience" or "voice" of the community. *See, e.g., Jones v. United States*, 527 U.S. 373, 382 (1999) (capital sentencing); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 600 (1996) (Scalia, J., dissenting) (punitive damages). Deciding whether conduct is reasonable is typically a jury function. Juries "are more representative institutions than is the judiciary; they reflect more accurately the composition and experiences of the community as a whole, and inevitably make decisions based on community values more reliably, than can that segment of the community that is selected for service on the bench." *Spaziano v. Florida*, 468 U.S. 447, 486-87 (1984) (Stevens, J., concurring in part and dissenting in part).

Juries were meant to play a central role in determining and policing the reasonableness of government action under the Fourth Amendment. *See, e.g.*, Akil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1180 (March 1991) ("Reasonableness vel non was a classic question of fact for the jury; and the Seventh Amendment, in combination with the Fourth, would require the federal government to furnish a jury to any plaintiff-victim who demanded one, and protect that jury's finding of

fact from being overturned by any judge or other government official"). Today too, juries perform this invaluable service. As the Third Circuit recognized in an excessive force case, "since we lack a clearly defined rule for declaring when conduct is unreasonable in a specific context, we rely on the consensus required by a jury decision to help ensure that the ultimate legal judgment of 'reasonableness' is itself reasonable and widely shared." *Abraham v. Raso*, 183 F.3d 279, 289-90 (3d Cir. 1999).

Yet by shifting factual reasonableness into the "clearly established" inquiry, the Fifth Circuit's approach restricts the ability of juries to define what should qualify as reasonable under the Fourth Amendment in an encounter like Tolan's shooting. Because deciding whether the law is clearly established is reserved to the court as a legal matter, resolving cases under the second prong as formulated by the Fifth Circuit cuts juries out of the task of assessing whether actions by officers are factually reasonable. As a result, Fourth Amendment law will increasingly lack the essential input of ordinary citizens, while judges assume the task of parsing through questions of fact better suited to jurors. That is what occurred here – the panel sloshed through the facts of the incident and decided to render a judgment on whether Cotton reasonably appeared threatened by Tolan, but then it used that factual determination to make what is supposed to be an entirely legal decision on immunity.

Fourth, the Court should grant certiorari to bring clarity and uniformity to lower courts' treatment of qualified immunity. Justice Ginsberg correctly predicted in *Saucier* that asking courts to navigate two

forms of reasonableness in Fourth Amendment qualified immunity cases "holds large potential to confuse." 533 U.S. at 210 (Ginsberg, J., concurring). The Third Circuit agreed in *Curley*, observing that the task "presents perplexing logical and practical problems." 499 F.3d at 208. "Confusion between the threshold constitutional inquiry and the immunity inquiry is... understandable given the difficulty courts have had in elucidating the difference between those two analytical steps." *Id.* at 214. This confusion accounts for the panel's decision in this case and the split among and within the circuits on how to define and apply the second prong.

Moreover, whether factual reasonableness is assessed under the first or second prong affects the outcomes of cases. For example, qualified immunity is unavailable when a plaintiff seeks injunctive relief. *See County of Sacramento v. Lewis*, 523 U.S. 833, 841 n. 5 (1998). In those cases, deciding the merits of the plaintiff's constitutional claim will be complicated by the widespread confusion between the two prongs. *See Higgins v. Penobscot County Sheriff's Dept.*, 446 F.3d 11, 17 (1st Cir. 2006) (Howard, J., concurring). This alone makes the matter more than "merely theoretical," as Judge Howard of the First Circuit put it in urging clarification. *See id.* More broadly, dispelling the confusion surrounding qualified immunity and ensuring plaintiffs and government officials receive uniform treatment across circuits and panels is a worthwhile goal in its own right.

IV. The Fifth Circuit's Decision is Erroneous

Finally, the Fifth Circuit erred in granting summary judgment. As the dissent from denial of rehearing en banc confirms, the parties dispute the key facts relating to whether Tolan reasonably appeared to pose a serious threat to Cotton. App. 96-98. These include whether the area was well-lit; whether Tolan's mother behaved calmly or was disruptive and thereby heightened the tension on the scene; whether Cotton slammed Tolan's mother into the garage door; whether Tolan leapt to his feet in a crouch and was poised to charge forward to intervene, or simply started to stand up and made it to his knees before being shot; and whether Tolan made a motion with his hands that could reasonably be seen as reaching for a gun in his waistband – as Cotton testified but Tolan emphatically disputed. *See id.*

If the evidence is construed in Tolan's favor, as it must be, a jury could easily find that it was unreasonable to regard Tolan as a life-threatening danger. App. 97-98. It could find Cotton should have been able to see what was happening on the porch because it was adequately illuminated. *See id.* It could conclude the Tolans gave Cotton ample reason to doubt that Tolan should be approached as a potentially hostile or armed car thief; after all, Tolan's parents were middle-aged homeowners in their pajamas who repeatedly and credibly told both officers that the supposedly stolen vehicle belonged to Tolan, that they lived there, and that Tolan was their son. *See id.* It could find Cotton violently threw Tolan's mother into the garage door, though she was only calmly talking to the other officer. *See id.* Above all, a jury could decide

Tolan did nothing more than say something challenging and get to his knees – for which he was shot in the chest and nearly killed. *See id.* "Robbie had no weapon and had not made any sort of reaching movement toward his waistband." App. 98. While Tolan had been ordered to lie down before he started to get up, it has long been settled that merely disobeying a police command to stay put is not enough to justify deadly force absent an imminent threat of serious harm. *See Garner*, 471 U.S. at 3-4, 10-11. Considering the havoc Cotton wreaked at the Tolans' home in only 32 seconds, a jury could find he was simply out of control that night and used patently excessive force.

In addition, the panel completely ignored the factual dispute over whether Cotton could have warned Tolan before shooting him. Cotton testified that he exclaimed "no" or "stop" before he fired, which is some evidence that giving a warning before shooting may have been possible. App. 104. But the Tolan family testified that Cotton did not say anything at all before he shot Tolan. App. 106. Under the Fourth Amendment, officers must give warnings before using deadly force if doing so is feasible. *See Garner,* 471 U.S. at 11-12. The Fifth Circuit's failure to even consider this issue is itself grounds for reversal.

The judges dissenting from denial of rehearing en banc were therefore correct in recognizing that "[i]f the panel opinion had applied the *Saucier* prongs correctly it would have concluded that the facts that the plaintiffs have shown make out a violation of their constitutional right to be free from excessive and deadly force by a police officer," precluding summary judgment. App. 99. There is also no serious

disagreement that Fourth Amendment law in this area is clearly established. *Id.* (noting that Tolan's rights were clearly established). Given the holdings in decisions like *Garner* and *Brosseau*, as well as relevant Fifth Circuit authority,[2] Cotton could not reasonably have thought shooting someone who does not appear to pose a grave and imminent threat in this sort of common encounter with a suspect comports with the Fourth Amendment. Consequently, reaching the legal issues raised by this petition would not be "an essentially academic exercise," but would change the outcome of the case. *Pearson*, 555 U.S. at 237.

CONCLUSION

The Court should grant the petition for writ of certiorari.

---

[2] *See, e.g., Reyes v. Bridgwater*, 362 Fed. Appx. 403, 408-09 (5th Cir. 2010) (finding that, as of 2006, when officer shot suspect holding knife, "[t]he cases on deadly force are clear: an officer cannot use deadly force without an immediate serious threat to himself or others. Here, the facts are unclear; was there such an immediate threat?"); *Graves v. Zachary*, 277 Fed. Appx. 344, 349 (5th Cir. 2008) ("It does not take a specific case for an officer to know that he cannot shoot a compliant suspect"); *Baker v. Putnal*, 75 F.3d 190, 198 (5th Cir. 1996) (denying summary judgment in light of factual dispute over whether suspect posed threat to officer who shot him).

Respectfully Submitted,

Martin J. Siegel
Counsel of Record
LAW OFFICES OF MARTIN J. SIEGEL, P.C.
Bank of America Center
700 Louisiana Street, Suite 2300
Houston, Texas 77002
(713) 226-8566
Martin@siegelfirm.com

George R. Gibson
NATHAN SOMMERS JACOBS
2800 Post Oak Boulevard, 61st Floor
Houston, Texas 77056
(713) 892-4843
Ggibson@nathansommers.com

Counsel for Petitioner

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A Opinion in the United States Court of Appeals for the Fifth Circuit (April 25, 2013) . . . . . App. 1

Appendix B Amended Final Summary Judgment in the United States District Court, Southern District of Texas, Houston Division (April 30, 2012) . . . . . App. 20

Appendix C (Corrected) Memorandum and Order on Jeffrey Wayne Cotton's and John C. Edwards's Motion for Summary Judgment in the United States District Court, Southern District of Texas, Houston Division (March 31, 2012) . . . . . App. 22

Appendix D On Petition for Rehearing En Banc in the United States Court of Appeals for the Fifth Circuit (August 1, 2013) . . . . . App. 91

Appendix E Transcript Excerpts

Excerpts of Direct Examination of Robbie Tolan, in the District Court of Harris County, Texas, 232nd Judicial District (May 6, 2010) . . . . . App. 100

Excerpts of Robbie Tolan Deposition Transcript
(October 26, 2010) . . . . . App. 102

Excerpts of Jeffrey Cotton Deposition Transcript
(November 15, 2010) . . . . . App. 104

Excerpts of Direct Examination of Marian Tolan, in the District Court of Harris County, Texas, 232nd Judicial District
(May 6, 2010) . . . . . App. 105

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12-20296

[Filed April 25, 2013]

ROBERT R. TOLAN; MARIAN TOLAN,	)
	)
Plaintiffs - Appellants	)
	)
v.	)
	)
JEFFREY WAYNE COTTON,	)
	)
Defendant - Appellee	)
	)

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 4:09-CV-1324

Before JONES, BARKSDALE, and SOUTHWICK, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge.

Primarily at issue in this appeal from a summary judgment is qualified immunity's being granted for a police officer's use of deadly force against a felony

suspect, injuring him. This action concerns the various claims of four plaintiffs against numerous defendants; the appeal is from a Federal Rule of Civil Procedure 54(b) judgment (partial final judgment capable of immediate appeal). This appeal involves only two of the plaintiffs and one of the defendants.

After summary judgment, based on qualified immunity, was awarded police officers Jeffrey Wayne Cotton and John C. Edwards against the four plaintiffs, the Rule 54(b) judgment was entered for the two Officers. Only Robert R. Tolan (Robbie Tolan) and his mother, Marian Tolan, appeal from that judgment, however; and they challenge only the judgment in favor of Sergeant Cotton. In doing so, they contest the underlying summary judgment, based on qualified immunity, awarded Sergeant Cotton against their excessive-force claims. Because no genuine dispute of material fact exists for whether Sergeant Cotton's directing deadly force at Robbie Tolan and non-deadly force at Marian Tolan was objectively unreasonable in the light of clearly-established law, the Rule 54(b) judgment in favor of Sergeant Cotton is AFFIRMED.

I.

For the reasons provided *infra*, the following facts are presented, as they must be on summary-judgment review, in the light most favorable to Robbie and Marian Tolan.

While patrolling shortly before two o'clock in the morning on 31 December 2008, in Bellaire, Texas, Officer Edwards noticed a black Nissan turn abruptly onto a residential street. Officer Edwards became

suspicious immediately because 12 vehicles had been burglarized in Bellaire the previous night, and he knew the street terminated in a cul-de-sac. Surveilling the Nissan from a distance, Officer Edwards observed Robbie Tolan and Anthony Cooper park on the street in front of a house and exit the vehicle. Officer Edwards drove past the vehicle and entered its license-plate number into his mobile data terminal (MDT). Officer Edwards mistakenly keyed an incorrect character; his entry resulted in a match with a stolen vehicle of the same make and approximate year of manufacture. The MDT sent a message automatically to other police units, alerting them Officer Edwards had identified a stolen vehicle.

Officer Edwards next approached the vehicle and, observing Robbie Tolan and Cooper carrying items from the vehicle to the house, illuminated them with his cruiser's spotlight. Officer Edwards exited his cruiser, drew his service pistol and flashlight, identified himself as a police officer, and ordered Robbie Tolan and Cooper to "come here". When Robbie Tolan and Cooper cursed Officer Edwards and refused to comply, Officer Edwards stated to them his belief the black Nissan was stolen and ordered them onto the ground.

Shortly thereafter, Robbie Tolan's parents, Bobby and Marian Tolan, exited the house through the front door. Again, Officer Edwards stated his belief that Robbie Tolan and Cooper had stolen the Nissan; Robbie Tolan and Cooper complied with Officer Edwards' ordering them onto the ground only after Marian and Bobby Tolan ordered them to do so. Bobby Tolan identified Robbie Tolan as his son, and Marian Tolan stated the Nissan belonged to them. Bobby Tolan yelled

at Cooper and Robbie Tolan to stay down; and Marian Tolan walked repeatedly in front of Officer Edwards' drawn pistol, insisting no crime had been committed. Dealing with four people in a chaotic and confusing scene, Officer Edwards radioed for expedited assistance. Sergeant Cotton responded and, hearing the tension in Officer Edwards' voice, believed him to be in danger. Sergeant Cotton arrived approximately one and one-half minutes after Officer Edwards' arrival.

Upon his arrival, Sergeant Cotton observed: Officer Edwards with pistol drawn; Bobby Tolan standing to Officer Edwards' left, next to a sport-utility vehicle parked in the Tolans' driveway, where Officer Edwards had ordered him to stand; Marian Tolan "moving around" in an agitated state in front of Officer Edwards; and Cooper lying prone. Sergeant Cotton drew his pistol and moved in to assist. Although Sergeant Cotton did not immediately observe Robbie Tolan, whose form was obscured by a planter on the front porch, Officer Edwards informed Sergeant Cotton that "the two on the ground had gotten out of a stolen vehicle". A single gas lamp in front of the house and two motion lights in the driveway illuminated the scene. In his deposition, Sergeant Cotton described the gas lamp as "decorative" and the front porch, where Robbie Tolan was lying, as "fairly dark"; in his deposition, Bobby Tolan stated the gas lamp provided enough light to identify a person in the front yard "within reason".

Robbie Tolan was lying face-down on the porch, with his head toward the front door and his arms extended. As noted, a planter on the front porch

obscured Robbie Tolan's position from Sergeant Cotton's view.

Sergeant Cotton recognized the immediate need to handcuff and search the felony suspects, but Marian Tolan's movement and demeanor frustrated the Officers' doing so; moreover, Marian Tolan continued to insist the car was not stolen, and stated they had lived in the house for 15 years. In an attempt to control the situation, Sergeant Cotton ordered Marian Tolan to move to the garage door; she refused, and became argumentative. Sergeant Cotton again requested Marian Tolan to move out of the Officers' way, and stated the situation would be worked out after they concluded their investigation. Marian Tolan's protestations continued; when Sergeant Cotton ordered her to "get against the garage", she refused, stating: "Me? Are you kidding?".

In response, Sergeant Cotton holstered his pistol, clutched Marian Tolan's arm, placed his other hand in the small of her back, and attempted to move her to the garage door. Despite her jerking her arm away and screaming "get your hands off me", Sergeant Cotton physically moved her to the garage door so a search of Robbie Tolan and Cooper could be conducted. From this angle, Sergeant Cotton then observed Robbie Tolan lying prone and facing away from Sergeant Cotton; the complaint for this action alleges the distance between Sergeant Cotton and Robbie Tolan was approximately 15 to 20 feet.

Sergeant Cotton's method of handling Marian Tolan angered Robbie Tolan; upon seeing his mother pushed into the garage door and hearing a metallic impact,

Robbie Tolan yelled "get your fucking hands off my mom!", pulled his outstretched arms to his torso, and began getting up and turning toward Sergeant Cotton. Fearing Robbie Tolan was reaching towards his waistband for a weapon, Sergeant Cotton drew his pistol and fired three rounds at Robbie Tolan, striking him once in the chest and causing serious internal injury. At the time, Robbie Tolan was wearing a dark zippered jacket, known as a "hoodie", which was untucked and hung over the top of his trousers, concealing his waistband. A subsequent search revealed Robbie Tolan was unarmed. Between Sergeant Cotton's arriving on the scene and his discharging his pistol, a mere 32 seconds elapsed.

In April 2009, Sergeant Cotton was charged in a state-court indictment with one count of aggravated assault by a public servant. A jury acquitted Sergeant Cotton in May 2010. As noted *infra*, excerpts from Sergeant Cotton's criminal trial, including testimony by Sergeant Cotton, Officer Edwards, and the Tolans, are in the summary-judgment record.

In May 2009, following Sergeant Cotton's being indicted that April, the Tolans and Cooper filed this action, *inter alia*, pursuant to 42 U.S.C. § 1983 against Sergeant Cotton, Officer Edwards, and the City of Bellaire, claiming, *inter alia*: Sergeant Cotton and Officer Edwards violated Robbie and Marian Tolan's right to freedom from excessive force (under Fourth Amendment, incorporated in Fourteenth); and both Officers acted in furtherance of a City of Bellaire official policy of racial profiling and discrimination. The

Officers invoked qualified immunity in their answer, and, after discovery, moved for summary judgment on that basis.

The district court, in an extremely detailed and well-reasoned opinion, granted the Officers' summary-judgment motion, based on qualified immunity; it held the Tolans and Cooper had not shown a constitutional violation, as required by the first of two prongs for qualified-immunity analysis, discussed *infra*. *Tolan v. Cotton*, 854 F.Supp. 2d 444, 478 (S.D. Tex. 2012). Finding there was "no just reason for delay", it entered final judgment for the Officers under Federal Rule of Civil Procedure 54(b).

II.

For an action involving multiple parties, a district court may enter final judgment for fewer than, *inter alia*, all parties if it "expressly determines that there is no just reason for delay". FED. R. CIV. P. 54(b). "If the language in the order appealed from . . . reflects the district court's unmistakable intent to enter a partial final judgment under Rule 54(b), nothing else is required to make the order appealable." *Kelly v. Lee's Old Fashioned Hamburgers, Inc.*, 908 F.2d 1218, 1220 (5th Cir. 1990) (en banc). Re-stated, a Rule 54(b) judgment is a final decision capable of immediate appellate review pursuant to 28 U.S.C. § 1291. *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 583-84 (1980); *Elizondo v. Green*, 671 F.3d 506, 509 (5th Cir. 2012).

Of the four plaintiffs, only Robbie and Marian Tolan contest the summary judgment. Moreover, they only contest its being awarded Sergeant Cotton.

A summary judgment is reviewed *de novo*. *Burge v. Parish of St. Tammany*, 187 F.3d 452, 464 (5th Cir.1999). Summary judgment is proper if movant shows: no genuine dispute as to any material fact; and being entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). "A dispute is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party." *Poole v. City of Shreveport*, 691 F.3d 624, 627 (5th Cir. 2012) (internal citation and quotation marks omitted). "A fact issue is material if its resolution could affect the outcome of the action." *Id.* (internal citation and quotation marks omitted). In that regard, all facts and inferences are construed in the light most favorable to non-movants. *E.g.*, *Cooper Tire & Rubber Co. v. Farese*, 423 F.3d 446, 454 (5th Cir. 2005). But, for review of a summary judgment upholding qualified immunity, plaintiff bears the burden of showing a genuine dispute of material fact. *Michalik v. Hermann*, 422 F.3d 252, 262 (5th Cir. 2005) (qualified-immunity defense alters summary judgment burden of proof).

Extensive discovery has been conducted. Sergeant Cotton supported his summary-judgment motion with, *inter alia*: portions of his, Officer Edwards', and Robbie, Marian, and Bobby Tolan's depositions; and portions of Doctor William Lewinski's and Lieutenant Albert Rodriguez' expert-witness depositions, as well as their declarations, to which their expert reports were attached. Robbie and Marian Tolan supported their opposition to that motion with, *inter alia*: portions of

Sergeant Cotton's and Officer Edwards' depositions and trial testimony; portions of Robbie Tolan's deposition and trial testimony, and his declaration; portions of Marian and Bobby Tolan's depositions and trial testimony; portions of Dr. Lewinski's deposition; and portions of Lt. Rodriguez' expert report and deposition.

Qualified immunity promotes the necessary, effective, and efficient performance of governmental duties, *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982), by shielding from suit all but the "plainly incompetent or those who knowingly violate the law", *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008) (internal citation and quotation marks omitted); *Mitchell v. Forsythe*, 472 U.S. 511, 526 (1985) (qualified immunity is immunity from suit, not merely an affirmative defense to liability). As noted, after defendant properly invokes qualified immunity, plaintiff bears the burden to rebut its applicability. *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002). To abrogate a public official's right to qualified immunity, plaintiff must show: first, the official's conduct violated a constitutional or statutory right; and second, the official's "actions [constituted] objectively unreasonable [conduct] in [the] light of clearly established law at the time of the conduct in question". *Brumfield*, 551 F.3d at 326.

For an excessive-force claim, plaintiff clears the first prong of the qualified-immunity analysis at the summary-judgment stage by showing a genuine dispute of material fact for whether plaintiff sustained: "(1) an injury (2) which resulted from the use of force that was clearly excessive to the need and (3) the excessiveness of which was clearly unreasonable".

Rockwell v. Brown, 664 F.3d 985, 991 (5th Cir. 2011) (quoting *Hill v. Carroll Cnty.*, 587 F.3d 230, 234 (5th Cir. 2009)).

For the second prong at the summary-judgment stage, plaintiff must similarly show a genuine dispute of material fact for two distinct, but intertwined, elements. "The second prong of the qualified immunity test is [] understood as two separate inquiries: whether the allegedly violated constitutional rights were *clearly established at the time of the incident*; and, if so, whether the [defendant's conduct] was *objectively unreasonable* in the light of that then clearly established law." *Hare v. City of Corinth*, 135 F.3d 320, 326 (5th Cir. 1998) (first emphasis in original) (second emphasis added).

In the excessive-force context at issue here, although the long-established two prongs of qualified-immunity analysis contain "objective reasonableness" elements, those prongs remain distinct and require independent inquiry. *Brumfield*, 551 F.3d at 326. Importantly, the sequence of analysis is immaterial, *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); qualified immunity may be granted without deciding the first prong if plaintiff fails to satisfy the second, *Kovacic v. Villarreal*, 628 F.3d 209, 213 (5th Cir. 2010). Deciding the second prong first is often advisable; for example, if, as here, a constitutional right is claimed to have been violated (first prong), "this approach [of first addressing the second prong] comports with [the] usual reluctance to decide constitutional questions unnecessarily". *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012).

A.

Contesting the summary judgment based on qualified immunity, Robbie Tolan contends a genuine dispute of material fact exists for whether Sergeant Cotton could have reasonably perceived him as a threat which justified the use of deadly force. He asserts a reasonable officer on the scene should have possessed information that Robbie Tolan was neither armed nor dangerous, thereby reducing the perceived threat level and negating any belief deadly force was necessary. Along that line, he relies on Marian and Bobby Tolan's exiting the house wearing pajamas and insisting Robbie Tolan and Cooper did not steal the vehicle. Robbie Tolan cites case law from other circuits for the proposition that this "updated information" negated any impression Sergeant Cotton may have had that deadly force could be reasonable. He disputes also Sergeant Cotton's maintaining Marian Tolan was shoved into the garage door so Sergeant Cotton could address a perceived threat; instead, Robbie Tolan contends he reacted *because* his mother was shoved into the garage door. Finally, asserting he never reached toward or into his waistband as claimed by Sergeant Cotton, Robbie Tolan relies on our court's unpublished opinion in *Reyes v. Bridgwater*, 362 F. App'x 403 (5th Cir. 2010), for the proposition that this disputed location of his hands is a genuine dispute of material fact, precluding summary judgment and, accordingly, mandating reversal.

The undisputed summary-judgment evidence, however, shows: Officer Edwards and Sergeant Cotton believed they were dealing with a felony vehicle theft; multiple burglaries of vehicles had occurred in the area

the night prior; the Tolans' front porch was not well lit; Robbie Tolan, in spite of Officer Edwards' having drawn his pistol, disobeyed orders to remain prone while the Officers attempted to establish order and investigate the situation; and Robbie Tolan's moving to intervene in Sergeant Cotton's separating his mother was preceded by his shouting "get your fucking hands off my mom!".

Viewing the summary-judgment record in the light most favorable to him, Robbie Tolan has not met his burden to show a genuine dispute of material fact, *Michalik*, 422 F.3d at 262, for whether Sergeant Cotton's conduct was objectively unreasonable in the light of clearly established law, *Brumfield*, 551 F.3d at 326. Accordingly, as discussed *infra*, and although based on a prong of qualified-immunity analysis different from that relied upon by the district court, Sergeant Cotton is entitled to qualified immunity; his actions being required to "be judged from the perspective of a reasonable officer on the scene" steers the analysis to that conclusion. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

1.

Exercising the above-referenced "usual reluctance to decide constitutional questions unnecessarily", *Reichle*, 132 S. Ct. at 2093, we do not reach whether Sergeant Cotton's shooting Robbie Tolan violated his Fourth Amendment right against excessive force (as noted, the district court relied on this first prong of qualified-immunity analysis). As discussed above, showing violation of a constitutional right does not end the inquiry when qualified immunity properly has been

invoked. Sergeant Cotton is entitled, through summary judgment, to qualified immunity under the second prong of the analysis.

2.

A right is sufficiently clear, and therefore "clearly established", when "every 'reasonable official would have understood that what he is doing violates that right'". *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "[E]xisting precedent must [] place[] the statutory or constitutional question beyond debate". *al-Kidd*, 131 S. Ct. at 2083. This "clearly-established" standard balances the vindication of constitutional or statutory rights and the effective performance of governmental duties by ensuring officials can "reasonably . . . anticipate when their conduct may give rise to liability for damages". *Davis v. Scherer*, 468 U.S. 183, 195 (1984). As discussed *supra*, this second-prong question of whether the law was *clearly established* cannot be untethered from the concomitant question of whether the challenged conduct was *objectively unreasonable* in the light of that clearly-established law. *Poole*, 691 F.3d at 630; *see also Saucier v. Katz*, 533 U.S. 194, 205 (2001), *modified by Pearson v. Callahan*, 555 U.S. 223 (2009) (qualified immunity under the second prong may attach irrespective of constitutional violation under the first, which in the excessive-force context includes a separate objective-reasonableness inquiry).

It is undisputed that, when Sergeant Cotton shot Robbie Tolan, it was also clearly established that an officer had the right to use deadly force if that officer

harbored an objective and reasonable belief that a suspect presented an "immediate threat to [his] safety". *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009); *see also Ontiveros v. City of Rosenberg*, 564 F.3d 379 (5th Cir. 2009); *Young v. City of Killeen*, 775 F.2d 1349 (5th Cir. 1985). Therefore, for Robbie Tolan to prevent Sergeant Cotton's having qualified immunity, he must show a genuine dispute of material fact on whether "every 'reasonable official would have understood'" Sergeant Cotton's using deadly force was objectively unreasonable under the circumstances and clearly-established law. *al-Kidd*, 131 S. Ct. at 2083; *Poole*, 691 F.3d at 630. To be sure, it was clearly established that shooting an unarmed, non-threatening suspect is a Fourth-Amendment violation. *Tennessee v. Garner*, 471 U.S. 1 (1985). But, that is only half of the equation for second-prong analysis; the remainder depends upon the totality of the circumstances as viewed by a reasonable, on-the-scene officer without the benefit of retrospection. *Poole*, 691 F.3d at 628.

As explained above, an objectively-reasonable officer in Sergeant Cotton's position would have had neither knowledge of, nor reason to suspect, Officer Edwards' having mistakenly identified Robbie Tolan's vehicle as stolen. Justified in his believing – however erroneously in hindsight – Robbie Tolan and Cooper had stolen a vehicle, an objectively-reasonable officer in Sergeant Cotton's position could have also believed Robbie Tolan's verbally threatening him and getting up from his prone position presented an "immediate threat to the safety of the officers". *Deville*, 567 F.3d at 167. Compounding that threat were the surrounding circumstances: the late hour; recent criminal activity in the area; a dimly-lit front porch; Marian Tolan's

refusing orders to remain quiet and calm; and the Officers' being outnumbered on the scene. Robbie Tolan admitted that he drew his outstretched arms toward his chest, did a push-up maneuver, and began turning to his left to face Sergeant Cotton; under the above-described circumstances, these actions could have placed an objectively-reasonable officer in, as Sergeant Cotton testified, fear for his life. Accordingly, whether Robbie Tolan reached into or toward his waistband does *not* create a genuine dispute of material fact on objective reasonableness *vel non*.

As part of the support for his summary-judgment motion, Sergeant Cotton presented expert testimony from Dr. Lewinski and Lt. Rodriguez. In his expert report, Dr. Lewinski stated that, as a matter of science, an officer has only one-quarter of one second to recognize a threat and respond accordingly. Likewise, Lt. Rodriguez stated in his deposition that officers have but a fraction of a second to react to threats. Further, and in the light of these scientific principles, they maintained officers cannot be trained to positively identify a weapon before resorting to deadly force. Robbie Tolan provided no evidence rebutting this expert evidence; yet, even if he had, an officer's right to use deadly force when objectively reasonable under the circumstances is also clearly established and "beyond debate", *al-Kidd*, 131 S. Ct. at 2083 – even when, as here, hindsight proves underlying assumptions to be erroneous. *E.g.*, *Young*, 775 F.2d 1349 (qualified immunity where officer fatally shot unarmed driver who reached under seat); *Ontiveros*, 564 F.3d 379 (same, where officer fatally shot unarmed suspect who reached into boot). In short, Sergeant Cotton's split-second decision to use deadly force does not amount to

the type of "plain[] incompeten[ce]" necessary to divest him of qualified immunity. *Brumfield*, 551 F.3d at 326.

Along that line, Robbie Tolan had clear and obvious warning of Officer Edwards' and Sergeant Cotton's believing deadly force might be required under the circumstances: both made clear their belief Robbie Tolan's vehicle was stolen; Sergeant Cotton drew his pistol upon his arriving on the scene; and Officer Edwards continually covered Robbie Tolan and Cooper with pistol drawn throughout the sequence of events. *E.g.*, *Garner*, 471 U.S. at 11-12 (deadly force not unconstitutional when probable cause to believe crime involving threat of serious physical harm has been committed and, if feasible, suspect warned deadly force may be used).

Noteworthy here, Robbie Tolan's refusing to obey a direct order to remain prone violated Texas Penal Code § 38.15 and Texas Transportation Code § 542.501 in Sergeant Cotton's presence; those sections provide: "[a] person commits an offense" by disrupting or impeding "a peace officer . . . performing a duty or exercising authority imposed . . . by law", § 38.15(a)(1); and "[a] person may not wilfully fail or refuse to comply with a lawful order . . . of a police officer", § 542.501. Such refusal, under the circumstances, could have reinforced an officer's reasonably believing Robbie Tolan to be a non-compliant and potentially threatening suspect. Robbie Tolan could have avoided injury by remaining prone as Officer Edwards, with pistol drawn, had ordered him to do. Instead, his shouting and abruptly attempting to approach Sergeant Cotton inflamed an already tense situation; in the light of his actions at the scene, a genuine dispute of material fact does not exist

regarding whether Sergeant Cotton acted objectively unreasonably. *E.g.*, *Deville*, 567 F.3d at 167; *Ontiveros*, 564 F.3d 379; *Young*, 775 F.2d 1349.

It goes without saying that this occurrence was tragic. But, the Officers' mistake of fact and Robbie Tolan's injury do not permit deviating from controlling law. Accordingly, and because Robbie Tolan has not shown a genuine dispute of material fact for whether Sergeant Cotton's shooting him was objectively unreasonable under clearly-established law, summary judgment based on qualified immunity was proper.

B.

Marian Tolan contends the summary judgment for Sergeant Cotton was improper because a genuine dispute of material fact exists for whether her right to freedom from excessive force was violated by Sergeant Cotton's grabbing her arm and shoving her against the garage door. Viewing the summary judgment record in the light most favorable to her, Marian Tolan has not created a genuine issue of material fact on whether Sergeant Cotton's conduct was objectively unreasonable in the light of clearly-established law.

1.

For the reasons stated above, and because the undisputed, material facts show Sergeant Cotton is entitled to qualified immunity under the second prong of the qualified-immunity analysis, we need not decide the first prong.

2.

Officers have a clearly-established right to use "measured and ascending" responses to control volatile situations while in the discharge of their official duties. *Poole*, 691 F.3d at 629 (internal citation and quotation marks omitted). Marian Tolan likewise violated Texas Penal Code § 38.15 and Texas Transportation Code § 542.501 by refusing to remain calm and move to the garage door as Sergeant Cotton ordered, thereby, as provided in § 38.15, impeding his performing a duty imposed by law and, as provided in § 542.501, "refus[ing] to comply with [his] lawful order".

There is no genuine dispute of material fact that this is what happened. Sergeant Cotton first used voice commands in an attempt to gain Marian Tolan's compliance and to facilitate his securing and searching two felony suspects. *E.g.*, *Deville*, 567 F.3d at 167-68 (officers should attempt voice commands before resorting to physical force when circumstances permit). Those commands having proved ineffectual, Sergeant Cotton used minimal physical force to move Marian Tolan away from Officer Edwards' line of sight in an attempt to restore order to a chaotic and confusing scene and to conduct the necessary investigation.

Accordingly, Sergeant Cotton's actions were not objectively unreasonable in the light of clearly-established law. Summary judgment based on qualified immunity was proper regarding Marian Tolan.

III.

For the foregoing reasons, the Rule 54(b) judgment in favor of Sergeant Cotton is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-09-1324

[Filed April 30, 2012]

ROBERT R TOLAN, MARIAN TOLAN, BOBBY TOLAN, and ANTHONY COOPER	)
Plaintiffs,	)
VS.	)
JEFFREY WAYNE COTTON, JOHN C. EDWARDS, and THE CITY OF BELLAIRE, TEXAS.	)
Defendants.	)

AMENDED FINAL SUMMARY JUDGMENT

Summary Judgment having been granted in the Court's (Corrected) Opinion and Order of the 31st day of March, 2012, it is hereby ORDERED that Plaintiffs Robert R. Tolan, Marian Tolan, Bobby Tolan, and

Anthony Cooper take nothing of Defendants Jeffrey Wayne Cotton and John C. Edwards and shall pay the costs of action.

It is further ORDERED that pursuant to Rule 54(b), the Court expressly determines that there is no just reason for delay, and directs entry of a FINAL JUDGMENT as to all claims of Robert R. Tolan, Marian Tolan, Bobby Tolan, and Anthony Cooper against Jeffrey Wayne Cotton and John C. Edwards.

SIGNED at Houston, Texas, this 30th day of April, 2012.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-09-1324

[Filed March 31, 2012]

ROBERT R TOLAN, MARIAN TOLAN, BOBBY TOLAN, AND ANTHONY COOPER	)
Plaintiffs,	)
VS.	)
JEFFREY WAYNE COTTON, JOHN C. EDWARDS, AND THE CITY OF BELLAIRE	)
Defendants.	)

(CORRECTED) MEMORANDUM AND ORDER ON JEFFREY WAYNE COTTON'S AND JOHN C. EDWARDS'S MOTION FOR SUMMARY JUDGMENT

Pending before the Court is the motion filed by Defendants Jeffrey Wayne Cotton ("Sergeant Cotton") and John C. Edwards ("Officer Edwards") for summary judgment on their defense of qualified immunity. (Doc.

67) Plaintiffs have filed a response to the motion (Doc. 70), to which Defendants filed a reply (Doc. 72). Plaintiffs then filed a surreply (Doc. 75), to which Defendants responded (Doc. 77). These filings and the accompanying exhibits have been reviewed and considered by the Court[1]

Each of the Plaintiffs: Robert R. Tolan ("Robbie Tolan"), Marian Tolan, Bobby Tolan, and Anthony Cooper has filed suit pursuant to 42 U.S.C. Sec. 1983 against each of the remaining Defendants, Cotton, Edwards, and the City of Bellaire for violation of their Fourth and Fourteenth Amendment rights.[2]

Undisputed Facts.

There is no dispute that just before 2:00 a.m. on December 31, 2008, outside a home located at 804 Woodstock Street, in Bellaire, Texas, Plaintiff Robert R. ("Robbie") Tolan was tragically shot by Bellaire Police Sergeant Jeffrey Wayne Cotton. There were six people who witnessed this shooting: Robbie Tolan and Sgt. Cotton; Robbie Tolan's parents, Marian and Bobby

---

[1] Defendants objected to certain exhibits submitted by Plaintiffs (Doc. 72). This motion is considered and ruled upon in a separate order.

[2] Plaintiffs originally brought a number of Texas state law claims against the defendants. On stipulation of the parties, these state law claims against the individual defendants were dismissed on January 4, 2011 (Doc. 69). On June 6, 2009 on stipulation of dismissal without prejudice filed by Plaintiffs, all defendants, except Cotton, Edwards, and the City of Bellaire, were dismissed without prejudice. (Doc. 25).

Tolan; Robbie Tolan's cousin, Anthony Cooper; and Bellaire Police Officer John C. Edwards. The question before the Court is whether the two police defendants, Sergeant Cotton and Officer Edwards may utilize the defense of qualified immunity from the lawsuit filed against them by Plaintiffs Robbie, Marian, and Bobby Tolan and Anthony Cooper.

In their opening brief Defendants summarize the evidence of what led up to the shooting. (Doc 67, at 2-8) The summary is undisputed by Plaintiffs and is taken largely from the deposition testimony of Sergeant Cotton and Officer Edwards and the four Plaintiffs. (Doc 67, Exhibits 2, 4, 15, 16, 17, 18). Briefly, the circumstances were that Officer Edwards was, at around 1:50 a.m. on December 31, 2008, on duty as a City of Bellaire police officer, patrolling in the area of the 5800 block of Bissonnet Street. He was aware that thieves had burglarized twelve vehicles in Bellaire the night before and that street gang graffiti had been placed on the buildings of the Bellaire shopping center located in the vicinity of his patrol. He was driving a marked City of Bellaire police car. The police car prominently displayed reflective tape and was equipped with a spotlight, overhead emergency lights, and a video recording system. The police car was also equipped with a computer and a Mobile Data Terminal (MAD).

While patrolling the vicinity Officer Edwards exited the shopping center parking lot on Evergreen Street and travelled eastbound. He observed a black Nissan Sports Utility Vehicle (SUV) travelling in front of him on Evergreen Street. The SUV made an abrupt turn onto Woodstock Street. The manner of the turn

suggested to Officer Edwards, among other possibilities, that either the driver was unfamiliar with the neighborhood, the driver did not want to be followed by a police car, the driver was a poor driver, the driver had been distracted, or the driver's ability to operate the vehicle was in some way impaired. Officer Edwards did not follow the SUV, but stopped his police car at the intersection of Woodstock and Evergreen and continued to observe the SUV. Officer Edwards knew that Woodstock ended in a *cul-de-sac*, and that if the driver wanted to exit Woodstock, the driver would need to return to Evergreen. Officer Edwards observed the male driver park the SUV on the west side of Woodstock and exit the SUV, along with his male passenger. Officer Edwards did not recognize the two men, but later learned that the driver was Robert "Robbie" Ryan Tolan ("Robbie Tolan") and the passenger, Anthony Cooper ("Cooper"). Robbie Tolan testified in his deposition that as he opened the door of the SUV, he saw headlights reflecting on the door. Robbie Tolan pointed out the headlights of the police car to Cooper, but Cooper had misplaced his wallet in the SUV and was too busy looking for it. (Doc. 67, Ex. 15, p. 28, line 25--p. 29, line 3; p. 30, line 25—p. 31, line 15; Ex. 16, p. 40, lines 1-9; Plaintiffs' Complaint, at paragraph 25). Officer Edwards also noted at that time that Robbie Tolan and Cooper looked in the direction of the police car when they exited the SUV. He also observed Robbie Tolan and Cooper remove items from inside the SUV.

Still observing the actions of Robbie Tolan and Cooper, Officer Edwards began to drive slowly past the SUV, noting as he drove, the license plate number. He typed what he believed to be the license plate number

of the SUV into the Mobile Data Terminal (MDT), his police car computer, in order to run a routine check on the SUV. Unfortunately when he entered the license plate number into the MDT he made a mistake. The actual number of the SUV was 696BGK, but Officer Edwards typed in 695BGK. The computer in the police car sounded an audible alert tone indicating that the license plate number that had been typed into the MDT matched that of a vehicle that was reported stolen and also audibly and visually announced that the vehicle with the license plate number he typed in was a Black Nissan that had been reported stolen. The MDT also automatically alerted the Bellaire Police Department dispatcher, who informed Officer Edwards the vehicle had been reported stolen. Officer Edwards told the police dispatcher the location of the SUV and that two males had occupied the vehicle.

Officer Edwards recognized at this point that he was involved in investigating a reported felony crime, that the two men who had occupied the supposed stolen vehicle were aware a police car was nearby, and that he was outnumbered. He called for backup from both the Bellaire Police Department and the Houston Police Department. In an attempt to maintain the *status quo* until backup arrived, Officer Edwards drove through the *cul-de-sac* turn and stopped the police car on the side of the road facing the SUV, but at a distance. Before backup arrived, however, Bobbie Tolan and Cooper approached as if to enter a residence in the neighborhood; they were carrying several items. This change in the circumstances prompted Officer Edwards to drive his police car forward and park in front of the SUV. He shined the police car spotlight to better illuminate Robbie Tolan and Cooper in the poorly lit

front yard and driveway of the house. He exited the police car and removed his handgun from its holster, calling to Robbie Tolan and Cooper, "Police, Come here." Officer Edwards was wearing a regulation Bellaire Police uniform; he carried his handgun in one hand and a flashlight in the other. His intention was to detain temporarily Robbie Tolan and Cooper near the SUV in order to make a field investigation of what he believed to be an automobile theft. When Robbie Tolan and Cooper failed to come to Officer Edwards, but proceeded in an opposite direction, Officer Edwards repeatedly ordered them to stop and lie on the ground.

In paragraph 37 of the complaint (Doc 1), Plaintiffs allege that, in response to their question of why he wanted them to lie down, Officer Edwards told Robbie Tolan and Cooper that he wanted them to lie down because he had information that the SUV was stolen. Both Robbie Tolan and Cooper testified in their depositions that they did not comply with Officer Edwards' verbal requests to lie on the ground. (Doc. 67, Ex. 15, p. 40, line 22—p. 41, line 8; Ex. 16, p. 51, lines 4-7) Robbie Tolan even stepped outside of the officer's view when he put a bag he was carrying behind a sago palm tree in a planter near the door of the house.

While Officer Edwards was ordering Robbie Tolan and Cooper to the ground, two people came from inside the house onto the front porch. Although Officer Edwards did not know it at the time, they were Robbie Tolan's parents, Robert ("Bobby") Tolan and his wife Marian Tolan. Bobby Tolan testified in his deposition that he told Robbie Tolan and Cooper to "shut the fuck up, be quiet, and get on the ground" (Doc. 67, Ex. 18, p. 48, lines 15-19). After his father told him this, Robbie

Tolan lay down on the porch of the house, with his head in the direction of the door and his feet toward the driveway. Cooper knelt down on the ground, nearer to Officer Edwards. While Bobby Tolan was talking to Officer Edwards, Marian Tolan walked about the front yard shouting. Officer Edwards had four people to watch, and he still had not investigated the automobile theft, so he called the dispatcher again to ask backup to hurry to the scene.

While all of this was transpiring at 804 Woodstock Drive, Sergeant Cotton was at the Bellaire Police Station doing paperwork. He heard radio transmissions that Officer Edwards had encountered a reportedly stolen vehicle along with two individuals who had occupied that vehicle. Sergeant Cotton responded in his police car. He first instructed Bellaire Police Corporal Chris Delk (Delk) to go to Braeburn Street, south of Woodstock Street, in case there was a foot pursuit. Sergeant Cotton then drove to 804 Woodstock Street. As he approached the Woodstock address Sergeant Cotton heard on the police car radio Officer Edwards's second, more urgent, call for backup. Sergeant Cotton arrived at 804 Woodstock at 1:53 a.m., some one and one-half minutes after Officer Edwards exited his police car. It is undisputed that at the time of Sergeant Cotton's arrival Robbie Tolan was lying prone on the porch, Cooper was on the ground, not necessarily prone, Bobby Tolan was standing next to his Explorer that was parked in the driveway, close to Officer Edwards, and Marian Tolan was moving around the front yard.

Disputed Facts

The facts set forth above are not disputed. At 1:53 a.m., however, some of the facts become disputed. The Plaintiffs rely upon these disputed facts to argue that a summary judgment of qualified immunity is inappropriate in this case. Sergeant Edwards and Officer Cotton, however, argue that although there may be details that are in dispute, the material facts that establish the defense of qualified immunity are not in dispute. There were six witnesses to what transpired that early morning of the shooting. Each of these witnesses has been deposed about the shooting A review of the depositions in some detail reveal that, although there are disputes about details and interpretations of the facts, there are no disputes of material fact.

Robbie Tolan's Deposition Testimony

Robbie Tolan testified that when Sergeant Cotton arrived on the scene he did not see him because he was lying face down on the porch of the house. Doc. 67, Ex. 15, p. 63, line 19—p 64, line 1. Although he could not see Anthony Cooper, he had a general idea of where he was. *Id.* p. 64, lines 7-24. Before he lay down on the porch he had seen his mother, Marian Tolan, "in the vicinity of Mr. Cooper." *Id.* p 71, lines 1-23. He also testified that, although he did not know it at the time, he knew at the time he gave his deposition that his mother was taking a Blackberry from Anthony Cooper when she went over to him as he lay on the ground. *Id.* p 72, lines 2-20.

Robbie Tolan testified that the first time he saw the man he now knows to be Sergeant Cotton he saw him walking down the driveway. Robbie Tolan was at that point lying on his stomach on the porch, with his head turned to his left. *Id.* p. 75, line 10—p. 76, line 8. He next saw Sergeant Cotton in the area of Cooper, where he saw Sergeant Cotton "grab my mother." *Id.* p.76, lines 14-25. He did not hear Sergeant Cotton say anything to his mother, but he heard his mother talking. He did not "remember exactly what she said." *Id.* p 77, lines 1-9. When asked if he recalled "generally" what she said, he responded that "I know she kept saying that this is our house and we live here, and things of that nature." *Id.* p. 77, lines10-13. Between the time Robbie Tolan lay down on the porch until Sergeant. Cotton fired his weapon, he remembered his mother saying only things in the nature of "this is our house, that car is not stolen." *Id.* p 78, lines 12-21.

Robbie Tolan further testified that when Sergeant Cotton grabbed his mother, Sergeant Cotton grabbed her arm, although Robbie Tolan did not recall which arm. *Id.* p. 79, lines 107. Robbie Tolan observed Sergeant Cotton then move parallel to the front of the house and then toward the garage door. *Id.* p.79, lines 11-21. While Sergeant Cotton was moving from the area where Cooper was located to the garage door area, Sergeant Cotton was holding Marian Tolan's arm, "kind of pushing her a little bit, kind of directing her." He further testified that "There was no tussle. I mean, but she – she wasn't exactly running over there either." *Id.* p 80, lines 3-24. While Sergeant Cotton and Marian Tolan were walking between Cooper and the garage door Robbie Tolan's mother made no noises or sounds,

but kept repeating "this is a mistake. . . we live here and things of that nature." *Id.* p. 81, 3-7. When Sergeant Cotton and Marian Tolan arrived in front of the garage door, they were "pretty much directly behind [Robbie Tolan]." *Id.* p. 83, lines 21-15. Robbie Tolan had continued to turn his head to the left and look backwards to follow what was going on between Sergeant Cotton and Marian Tolan. He had a good view of them. He "saw and heard Sergeant Cotton push my mom against the garage door. . . . And it made a loud noise." *Id.* p. 84, lines 1-25.

The sight and sound of his mother being pushed against a metal garage door "caused [him] to want to get up from the position that [he was] laying in . . . . because [he was] upset about seeing [his] mother being pushed into a garage door." *Id.* p. 85, lines 1-19. At that point in Robbie Tolan's deposition, there were the following questions and answers:

> Question: "[A]m I correct in saying that not only did you want to get up from the position of 'RT' [the position in which he was lying on his stomach on the porch], but you wanted to turned [sic] around to where your mother and Sergeant Cotton were?"
>
> Answer: "That I wanted to, yes, sir."
>
> Question: "In fact, that's what you were doing at the time you were shot, right?"
>
> Answer: "True."

Question: "You were getting up and turning around toward your mother and Sergeant Cotton?"

Answer: "True."

Id., p 85, line 20—p. 85, line 8

Robbie Tolan testified that while he was lying prone on the porch he had his arms out in front of him. In order to get up he had "to pull [his] arms back towards kind of [his] chest area and push up. . . ." He "used kind of like a push up maneuver to get [himself] up." *Id.* p 100, lines 13-24. He was "turning, ...pushing up with [his] hands, and turning towards [his] left." *Id.* p. 101, lines 6-8. At the time he was not thinking about the mechanics of getting up:

Question: [Y]ou've been asked to talk about kind of the mechanics of getting up that night. Right?

Answer: Yes.

Question: Just like we're doing here, we're talking about pulling your hands back, push up with both hands, and at the same time that you're turning around, right?

Answer: Yes, sir.

Question: Okay. But, would it be right for me to say, Mr. Tolan, that at the time that you were getting up that morning, would it be right for me

to say you really weren't thinking about how you were doing it, right?

Answer: Sure.

Question: In other words, people have asked you, how were you doing it, and you have tried to kind of recreate it in your mind and describe it, right?

Answer: Yes, sir.

Question: But in terms of each thing that you were doing at the moment you were doing it, would it be right for me to say it's not something you were thinking about at the moment that you were doing it?

Answer: Sure

Question: So when you give us a recreation of it, it is your best guess of how you were doing it, right?

Answer: Sure.

Id., page101, line 10 -- page 102, line 10

Later in his deposition Robbie Tolan described further the circumstances of his being shot:

Question: Now, so as you're getting up and I think you told me you're turning to your left as you're getting up?

Answer: Yes, sir.

Question: Okay. And is Sergeant Cotton -- as you're turning towards Sergeant Cotton, and getting up, is Sergeant Cotton still holding your mother by the arm?

Answer: To my knowledge, yes.

Question: Okay. And as you're getting up and turning to your left -- by the way, did you get up quickly or slowly?

Answer: Pretty quickly, I suppose.

Question: All right. And as you're getting up, did you scream or raise your voice and say, "Get your fucking hands off my mom?"

Answer: Yes, sir.

Question: You were angry by then, right?

Answer: Yes, sir.

Question: And, so, if somebody said they saw an angry look on your face, you would say, well, that would probably be right, right?

Answer: Sure.

Question: And you would agree with me, wouldn't you, that saying something like "get your fucking hands off my mom" is an aggressive

statement? You would agree with that, wouldn't you?

Id., page 105, line 9 -- page 106, line 10

Question: And in turning, are you -- were you able to see Sergeant Cotton's face as you are turning towards him?

Answer: Yes, sir.

Id., page 106, lines 19-22

Question: Did you see Sergeant Cotton actually unholster his weapon?

Answer: Yes, sir.

Question: And would it be right for me to say that you did not see Sergeant Cotton unholster his weapon until you were beginning to get up and turning [sic] toward him?

Answer: Yes, sir.

Question: In other words, from what you observed, Sergeant Cotton's weapon was holstered up until the time that you hollered to him and began getting up and turning toward him

Answer: Sure.

Question: And then he unholsters his weapon, right?

Answer: Yes, sir.

Question: Points it at you, and at the same time, practically immediately, is shooting, right?

Answer: Yes, sir.

Id., page107, lines 6-22.

Bobbie Tolan agreed that "the first thing that Sergeant Cotton did after he fired his weapon was to come over to you and check you for weapons. . . . And when he didn't find a weapon, he specifically said to you, what were you reaching for, right?" *Id*, page 114, lines 8-15

Deposition Testimony of Anthony Cooper

Anthony Cooper testified that he saw Sergeant Cotton arrive. "He came from the street, and he was on the side of the Suburban [the Tolans' automobile parked in the driveway]. Doc. 67, Exhibit 16, p. 74, lines 18-24. About the same time Sergeant Cotton arrived, Cooper went from his knees to lying on the ground. At some point, either when Cooper was on his knees or lying on the ground, Marian Tolan came over and picked up his Blackberry from the ground. *Id*. 75, line 4—p 76, line 24.

Cooper was asked in his deposition whether from the time he and Robbie Tolan first communicated with Officer Edwards, through the time Mr. and Mrs. Tolan came out of the house, to Robbie Tolan's shooting, "was there ever a time that none of you were talking, that you weren't talking, that Robby wasn't talking, that

Marian Tolan wasn't talking, and Bobby Tolan wasn't talking, or was somebody from the Tolan family? Or are you always talking during that time?" Cooper answered, "I mean somebody was--every--there were people--everybody was talking." *Id.*, page 141, lines8-22. He was further asked, "[W]as there ever a time it was quiet--from the time that Officer Edwards approached you up until the time that Sergeant Cotton shot, was there ever a time that some Tolan or Mr. Cooper was not talking?" Cooper answered, "No." *Id.*, page 142, lines 3-8.

Cooper described the contact Sgt. Cotton made with Marian Tolan:

> Question: "Okay. So, did you see Sergeant Cotton ever touch Mrs. Tolan?"
>
> Answer: "Yes."
>
> Question: "Okay. And where was Sergeant Cotton when he touched Mrs. Tolan the first time you saw it?"
>
> Answer: "The Suburban was here."
>
> Question: "Okay."
>
> Answer: "And Bobby was on the Suburban. Marian was –"
>
> Question: "Put a 'B' for Bobby for—will you, please?"
>
> Answer: "Bobby was on the Suburban."

Question: "Uh-huh."

Answer: "Marian was right where the front porch—she was started from the front porch—"

Question: "Uh-huh"

Answer: "-- and she worked her way through the sidewalk right here where—where I was laying at. This is the sidewalk right here."

Question: "Yes sir."

Answer: "And she grabbed the phone."

Question: "Uh-huh"

Answer: "And I believe when she grabbed the phone, Sergeant Cotton and – Sergeant Cotton was there, and he told her, or grabbed her, and--"

Question: "All right. You're imparting by C3, is that where you saw Sergeant Cotton touch Mrs. Tolan or was it somewhere else?"

Answer: "That's where he grabbed her."

Id. p. 76, line 11—p. 77, line12.

When asked if he saw Sgt. Cotton push Marian Tolan into the garage door, Anthony Cooper responded, "I saw him grab her arm. . .and shoved her against the

garage door." He heard her hit the garage door with "a big bang and she slid down on her butt." *Id.* p. 77, lines 17-24.

Cooper testified that he heard the shots, "maybe a second after she hit the garage door." *Id.* p 78, lines 8-11. He remembered that Sergeant Cotton's weapon was out of the holster when he grabbed Marian Tolin. *Id.* p. 81, lines1-24. He later remembered, within the next few pages of the deposition that from the time Marian Tolan hit the garage door and hit the ground until he observed Sergeant Cotton fire his weapon, "It was within seconds." *Id.* p. 82, lines 20-23. When asked what would be the most seconds he would say it was, he replied, "Maybe five seconds. *Id.* p. 83, lines 5-8. He also testified that did not remember and knew nothing about Robbie Tolan getting up or trying to get up off the ground. *Id.* p. 87, lines 1-23. He agreed, however, that as Robbie Tolan lay on the porch, his head was facing away from where his mother had been pushed into the garage door, so that in order to see the garage Robbie Tolan would have to turn around. *Id.* p. 88, line 14—p. 89, line 7. Cooper agreed that Sergeant. Cotton was standing "in the same position or right—right about the same position where he pushed Mrs. Tolan into the garage door, when he fired his weapon," and that Sergeant Cotton did not move toward Robbie Tolan before he fired. *Id.* p. 111, lines 3-13. Cooper also agreed that up until Sergeant Cotton fired his weapon he never saw Sergeant Cotton off the driveway anywhere. *Id.* p 134, lines 3-7.

Marian Tolan's Deposition Testimony

Marian Tolan testified at her deposition that when she and her husband exited the front door of their house at 804 Woodstock, their son Robbie Tolan was in the process of unlocking that front door. Doc. 67, Exhibit 17, p. 44, line 24—p 45, line 25. Once they walked outside the front door she could see Cooper and Officer Edwards, as well as their son Robbie Tolan. *Id.* p. 47, lines 1-4. She did not believe at that time Sergeant Cotton had arrived at the house. *Id.* p. 47, lines 12-18. There were no police officers there, except Officer Edwards. *Id.* p. 47, lines 23-25. When Marian Tolan and her husband came out of the house Officer Edwards was saying to Anthony Cooper and Robbie Tolan, "Get Down." *Id.* p 48, line 23—p. 49, line 3. She and her husband also told Cooper and Robbie Tolan to get down. *Id.* p. 49, lines 14-20. After the Tolans told Anthony Cooper and Robbie Tolan to get down, perhaps twice, they complied. *Id.* p. 50, lines 6-9.

Marian Tolan testified that when Sergeant Cotton arrived she could not see him, so she was unable to say if he had his gun drawn and if he placed his gun back into his holster before withdrawing it again to shoot. She only knew that he replaced the gun in the holster after the shooting. *Id.* p. 66, line 18--p. 67, line 12.

Marian Tolan was asked, "Robb[ie] had gotten up from lying down on the ground, as you and your husband had instructed him to do, without anybody giving him permission to do it or telling him it was okay to do it, when Sergeant Cotton shot him, right?" She answered, "Yes." *Id.* p. 92, lines 8-13. Then, she was asked, "He was going from laying on the ground to

not laying on the ground?" She answered, "Yes." Then she was asked, "He was in the process of getting up when he got shot, wasn't he?" She answered "Yes." *Id.* p. 92, line 25—p. 93, line 5. Later in the deposition she was asked, "At the time that Sergeant Cotton fired at Robb[ie] as Robb[ie] was getting off the ground, had anyone checked yet to see whether Mr. Cooper or Robb[ie] Tolan had a weapon?" She answered, "No." The next question posed to her was, "Whether either of those gentlemen had a weapon at the time that Sergeant Cotton responded to Robb[ie] getting up off the ground, can we agree was uncertain?" She answered, "It was uncertain." *Id.* p. 116, lines 3-12.

Marian Tolan characterized being pushed against the garage door as an assault. When asked what she was doing when she was assaulted by Sergeant Cotton, she answered, "Talking." *Id.* p. 117, lines 19-24. She was then asked what Sergeant Cotton was asking her to do, and she responded that he said "Get against the garage—get against the wall," which she did not do. *Id.* p. 117, line 25-p. 118, line 8. She testified that "I could not believe he was asking me to do that. That is why I responded the way that I did." *Id.* p. 118, lines 20-21. She told Sergeant. Cotton, "Me? Are you kidding me? We've lived here 15 years. We've never had anything like this happen." *Id.* p. 118, lines 23-25.

Marian Tolan further testified that after Sergeant Cotton "threw" her into the garage door, Robbie Tolan started to get up from the ground. He told Sergeant Cotton "to get his hands off of his mom." *Id.* p 174, lines15-25. She was then asked if he did not actually say, "Get your fucking hands off my mom," and she answered, "I don't recall him using that word, but he

says he did." *Id.* p. 175, lines1-4. She agreed that it was at that point that Sergeant Cotton shot Robbie Tolan. *Id.* p. 175, lines 5-7. She was asked if Sergeant Cotton withdrew his weapon from its holster before firing. She responded, "I didn't see it until then." *Id.* p. 175, lines 8-14. The three gunshots came immediately after each other, with no delay, and it sounded like one gunshot to her. Id. p. 175, line 21—p. 176, line 7. After the shooting, Sergeant Cotton called paramedics first and then asked Marian Tolan, "Is there anyone else in the house?" When Marian Tolan said, "No," Sergeant Cotton went over to Robbie, "Turned him over and emptied his pockets and said, 'What were you reaching for?" Robbie responded, "Nothing." *Id.* p 176, lines12-25. From the moment Sergeant Cotton arrived at 804 Woodstock until the time he fired his weapon, Marian Tolan agreed, took 32 seconds. *Id.* p. 178, lines 6-8.

Deposition Testimony of Robert, "Bobby," Tolan

Robbie Tolan's father, Bobby Tolan testified in his deposition that although he did not know it at the time, he has since learned that when Officer Edwards got out of his police car and followed Robbie Tolan and Anthony Cooper toward the house at 804 Woodstock Street, Officer Edwards had heard a report that the automobile whose license plate he had entered into his police car computer was stolen. Doc. 67, Ex. 18, p 29, lines17-25. He agreed that as he exited his house and walked to Officer Edwards he told Robbie Tolan and Anthony Cooper to get on the ground and shut up; this took only a few seconds. *Id.* p. 48, lines 18-19; p. 54, lines 1-8. He also agreed that he then went from being in front of Officer Edwards to putting his hands on the Suburban in the driveway because Officer Edwards

asked him to put his hands on the Suburban; from the time he walked out his front door until he was standing by the Suburban took a few seconds. *Id.* p. 54, line 19—p. 55, line 20. Bobby Tolan testified that he never saw Sergeant Cotton in his front yard the night of the shooting. He did not see anything Sergeant Cotton did, nor did he see any interaction between his wife and Sergeant Cotton. He did hear a bang against the garage door. *Id.*, p. 60, lines 3-25. Immediately after hearing the sound of something going against the garage door, he heard the gunshot. When he turned to look he saw his wife with her back to the garage door, sliding down the door. *Id.* p 62, line 24-p. 63, line 8. Immediately after that he was told to go over to the police car. *Id.* p. 64, line 16-p. 65, line 3. While Bobby Tolan was standing next to the Suburban he was unable to see his son Robbie Tolan at any time. *Id.* p. 65, lines 4-6. Bobby Tolan did not hear his son Robbie say, "Get your fucking hands off my mother" before the shot was fired. *Id.* p. 85, lines 10-13. Bobby Tolan agreed that there was "basically a lot of loud commotion in [his] front yard between when [he] first came out and when the gunshot occurred. *Id.* p. 85, line 25—p. 86, line 4. He was asked "Have you seen anything or heard anything that leads you to believe that Officer Edwards knew of the race of either of the occupants in the vehicle?" Bobby Tolan answered, "I have no idea." *Id.* p. 91, lines 22-25. He also agreed that he had "no facts" that lead him to believe that the race of anybody involved had anything to do with shooting, but he has his opinion. *Id.* p. 92, lines 3-19. Bobby Tolan explicitly testified that neither Officer Edwards, nor Sergeant Cotton, used any force against him at all.

Id., p. 54, line 24 -- page 55, line 25; page 56, lines 4-12; page 60, lines 3-9. His wife, Marian Tolan, agreed. Doc. 67, Exhibit 17, page 163, lines 12-16.

Deposition Testimony of Sergeant Jeffry Wayne Cotton

Sergeant Cotton admitted in his deposition that he shot Robbie Tolan. Doc. 67, Ex. 2, p 8, lines 11-15. The night Robbie Tolan was shot Sergeant Cotton was the shift supervisor at the Bellaire Police Department; in other words he was in charge of the patrol officers and the dispatchers for the eight hour shift. *Id.* p. 14, lines1-13. As the shift supervisor Sergeant Cotton was Officer Edward's supervisor. *Id.*, lines 14-17. The shift began at 10:30 p.m. *Id.*, p. 15, lines 7-10.

A little before two a.m., while he was working on entering data for an accident report, Sergeant Cotton heard Officer Edwards call in a suspicious car with two men in it. *Id.* p. 27, line 16 – p. 28, line 24. Sergeant Cotton testified that he decided to go to the scene to back up Officer Edwards. *Id.* p. 35, line 2-6. Just as he was leaving the police station he heard the information that the vehicle is stolen. *Id.* p. 37, lines 104. He drove to the scene without using the siren or flashing lights on the police car. *Id.* p. 36, lines 1-5. As he approached the scene Sergeant Cotton heard Officer Edwards advise on his radio that the suspects were moving, and "that he was going to have to take them, meaning he was going to have to—to address the suspects right now before backup was going to be able to get there." *Id.* p. 37, line 24—p. 38, line 5. After that transmission Officer Edwards transmitted a message that back up needed to hurry. *Id.* p. 41, lines 14-20. Sergeant Cotton noticed some tension in Officer Edwards's voice, and

Sergeant Cotton "perceived [Officer Edwards] was in a dangerous situation." *Id.* p. 42, lines 6-12.

When Sergeant Cotton arrived at the scene, 804 Woodstock, he did not know the race of the suspects. *Id.*, p. 34, lines 16-19. He also did not know the race of the Tolans or Anthony Cooper. *Id.*, p. 42, line 23—p. 43, line 1.

As soon as Sergeant Cotton parked his police car he got out of it very quickly. *Id.*, p. 43, lines 22-25. He saw Officer Edwards standing in the front yard with a drawn gun. He saw Bobby Tolan standing to his left in the yard and Marian Tolan "moving around the front yard." He saw "at least" Anthony Cooper lying on the sidewalk. He did not at first see Robbie Tolan. *Id.*, p. 44, lines 1-10. Sergeant Cotton testified that Marian Tolan "was in dynamic movement, so I don't remember the –specific spot that she was in. She was moving around from Officer Edwards' left to in front of him to his right, kind of all in that area in front of him." Officer Edwards had drawn his weapon. *Id.*. p. 44, line 25—p. 45, line 6. It was a hand gun that he was pointing in the direction of Cooper and Robbie Tolan. *Id.* p. 45 line 12—p. 46, line 1.

Sergeant Cooper testified that he also drew his hand gun and moved over to Officer Edwards, touching him on the shoulder with his shoulder. He asked him something like, "What have you got?" Officer Edwards responded that "the two on the ground had gotten out of the stolen vehicle." He could by then see at least part of Robbie Tolan's hands or head sticking out past the planter on the porch. *Id.* p.46, line 10- 19. Cooper was on the ground, but Sergeant Cotton could not

remember if he was then on his stomach or on his back. Both suspects appeared to him to be complying, "for the moment" with Officer Edwards directives. *Id.* p. 46, line 20—p. 47, line 3.

Sergeant Cotton testified that the next thing he believed he needed to do was search and handcuff the suspects, but Marion Tolan was still in front of Officer Edward's pointed gun, "so I needed to get her controlled before I could move into the suspects." Although Marian Tolan was "putting herself between [Officer Edward's] weapon and Anthony Cooper and Robbie Tolan," Sergeant Cotton did not interpret her actions as trying to block a shot from Officer Edward's gun. Rather, "she was just moving around kind of not really paying attention to the gun, just very agitated and – and upset and moving kind of all over the scene." *Id.* p. 47, lines 5-19. She was also talking as she moved. Sergeant Cooper paraphrased that what she was saying was "What are you doing here, we live here, you shouldn't be here, those kinds of things." *Id.* p. 47, line 20—p. 48, line1. He also remembered that at some point, when he addressed Marian Tolan, that she said, "That's our car." *Id.* p. 48, lines 5-8.

Sergeant Cotton remembered that the exterior lighting consisted of a gas lamp "out front," which shed "some, but not a lot" of light, "more decorative than—than illuminating" and two spotlights on the driveway. The area in which Cooper was situated was better lit than the porch, which was "fairly dark." Sergeant Cotton could, however, see Robbie Tolan lying on the porch. *Id.* p. 49, lines 4-25. Sergeant Cotton testified that Robbie Tolan was lying "with his feet toward the driveway and his head toward the front

door," with his arms stretched out in front of him, "more like Superman" than an airplane, and his fingertips "pointing towards the front door." *Id.* p. 50, lines 6-16.

Immediately after speaking to Officer Edwards, Sergeant Cotton's attention was directed toward Marian Tolan, whose behavior "heightened [his] tension." *Id.* p. 50, line 25—p. 51, line 3. "I identified her as being part of a scene that was out of control that was going to have to be controlled before we could move forward." *Id.* p. 51, lines 6-9. "What needed further control was that both the felony suspects needed to be cuffed and searched," and at that point Marian Tolan was "hindering [his] ability to cuff and search the two felony suspects." *Id.* p. 51, lines 13-18. Sergeant Cotton asked Marian Tolan "several times" to move to the garage door. Her response was "noncompliant, kind of argumentative. She was upset and continuing to--to protest." *Id.* p. 51, line 23—p. 52, line 2.

Sergeant Cotton testified that Marian Tolan said, "We live here, what are you doing here, you shouldn't be here, and that that's our car." His only response "was to tell her to calm down, to let us do our investigation, we'll work everything out." She was still noncompliant. He recalled that Marian Tolan "maybe took one or two steps towards the garage door, and then stopped and began protesting again." They were not close to the garage door, but "still on the driveway or kind of on the edge of the driveway to Officer Edwards' right." Id. p. 55, lines 1-20.

"As soon as [he] addressed her, [Sergeant Cotton] holstered [his] weapon and then was trying to gain her

compliance. When Marian Tolan would not comply, Sergeant Cotton testified that "I grabbed her right arm, I believe with my right hand, and put my left hand at the small of her back to start escorting her over to the garage door." *Id.* p. 57, lines3-7. Marian Tolan was talking as he was escorting her, and soon after he first touched her, "she flipped her arm up trying to flip my—hand off of her and said, 'Get your hands off of me.'" *Id.* p. 57, lines 19-23. She tried to flip up her right arm, and she turned over her right shoulder to say to him, "Get your hands off me." All the while he was walking her in the direction of and getting closer to the garage door. *Id.* p. 58, lines7-18.

Sergeant Cotton testified that he was gripping her arm, "not as hard as I could, but enough to—to gain control of another person." His "intention was certainly not to cause a bruise. . . ." *Id.* p. 58, line 19--p. 59, line 4. He did not believe that he had caused bruises. *Id.* p. 59, line 8.

As he and Marian Tolan moved toward the garage door Sergeant Cotton passed the planter on the porch and got a clear view of Robbie Tolan lying on the porch. *Id.* p. 59, lines 16-24. Officer Edwards was still "covering" Robbie Tolan and Anthony Cooper. *Id.* p. 59, line 25—p. 60, line 4.

Sergeant Cotton and Marian Tolan were almost to the garage door. Sergeant Cotton glanced at Robbie Tolan on the porch and then turned his attention back to Marian Tolan when he heard Robbie Tolan yell, "Get your fucking hands off her." When Sergeant Cotton heard Robbie Tolan make that statement he also saw Robbie Tolan getting up and turning around. In order

to address Robbie Tolan and to get Marian Tolan out of the way, he pushed Marian Tolan away from him. *Id.* p. 60, line11—62, line 15.

Sergeant Cotton testified that Robbie Tolan had been lying down on the porch, hands outstretched towards the front door, but when Sergeant Cotton looked again at Robbie Tolan when he said "Get your fucking hands off her," Robbie Tolan "was already partially up." Sergeant Cotton further testified

> [Robbie Tolan] wasn't still—so I did not see all of his getting up. When I looked again after hearing him, he was already getting up, probably halfway up or so, and was turning to his right rotating with his face toward the window.

Id. p. 63, lines 8-12

Sergeant Cotton further testified, "When I first looked, he was—still had his back, for the most part, to me in the process of rotating" to look at Sergeant Cotton. *Id.* p. 63, lines 21-25. He also testified that he did not know where Robbie Tolan was when he said the words, "Get your fucking hands off of her." *Id.* p. 64, lines 1-15.

Sergeant Cotton also testified that he did not see Robbie Tolan "pull his hands back towards his midsection to push himself off of the concrete" in order to get up off the ground. *Id.* p. 64, lines 20-24. Rather, after hearing Robbie Tolan yell, Sergeant Cotton turned and saw Robbie Tolan "was up in a crouch kind of in the process of getting up with his feet under him

facing kind of away from me while—as he was rotating to his right." *Id.* p. 64, line 25—p. 65, line 5.

When asked where Robbie Tolan's arms were, Sergeant Cotton testified that Robbie Tolan's right hand was at his waistband and he did not know where his left hand was. By "at his waistband," Sergeant Cotton testified that he meant "in the middle of his waist," "in the center of his body," "where his belt buckle would be." *Id.* p. 65, lines 6-15. Sergeant Cotton testified that Robbie Tolan was wearing a dark, zippered hoodie not tucked into his pants. *Id.* p. 65, 16-23.

Sergeant Cotton testified that he thought Robbie Tolan was drawing a weapon from his waistband. Sergeant Cotton could not see his hand, but he could see where his hand was. It was dark, but "I could see his total movement, which is what made me believe that it wasn't necessarily just where his hand was, for instance." He did know that he had his hand in the vicinity of his waistband. *Id.* p. 67, line 4-19.

According to Sergeant Cotton, Robbie Tolan was not running toward Sergeant Cotton, but he was turning around to face Sergeant Cotton, on both feet. *Id.* p. 67, line 20--p.68, line 3. Sergeant Cotton testified that he thought that Robbie Tolan "was drawing a weapon to shoot me." He was in fear of his life. It was not any one thing that made him afraid, but the "totality of everything that was happening that put me in fear, which included the way he was getting up and where his hand was and –while he was getting up" *Id.* p. 68, line 4—p. 69, line 2.

Deposition Testimony of Officer John C. Edwards

Officer Edwards testified that when Sergeant Cotton arrived at 804 Woodstock, Anthony Cooper was lying on the ground, "moving from side to side, fidgeting with his phone, with his head towards the street. Doc. 67, Ex. 4, p. 41, lines 20-25. Officer Edwards told Sergeant Cotton that two of the four people in the front yard came out of the house and two came out of the car. Sergeant Cotton then proceeded towards the garage door in the direction of where Marian Tolan was located. At that point Officer Edwards turned his attention to Cooper. *Id.* p. 44, lines1-18. He did this because he thought Sergeant Cotton would watch the person he now knows to be Robbie Tolan, *Id.* p. 45, line 21—p. 46, line 2. Officer Edwards was still telling Cooper to lay still and quit "flipping and flopping around." Bobby Tolan came up to talk to Officer Edwards, but Officer Edwards does not recall what he said. *Id.* p. 46, lines 5-12. Marian Tolan had gone off to the side with Sergeant Cotton. "[S]he was all over the scene basically. She would start over with Anthony, walk into the driveway, back behind Bobby, back towards the front of the house. . . . I can't watch her moving around and – another guy laying on the ground, plus another guy that's partially behind a bush laying on the ground." *Id.* p. 46, line 19—p. 47, line 9. Officer Edwards was aware of her movements, and they made his job more difficult. When Sergeant Cotton arrived, he took Marian Tolan off in a different direction. *Id.* p. 47, lines15-21.

The next thing Officer Edwards remembered happening was, from his right, the area Sergeant

Cotton and Marian Tolan were in, he heard "shouting or yelling, getting, I guess, more agitated . . .in the general direction of Robbie." This drew his attention, but Officer Edwards did not at that point look at Marian Tolan and Sergeant Cotton. He testified he needed to focus on Cooper. Robbie Tolan was also his responsibility, but he could not see Robbie Tolan, "except for his hands and part of his head," his shoulders up, because Officer Edwards's view was obscured by the sago palm in the planter on the porch. *Id.* p. 47, line 24—p. 48, line 24. After he heard the noise being made Office Edwards saw Robbie Tolan's hands move, and then Robbie Tolan disappeared from Officer Edwards's view. *Id.* p. 52, lines 3-9. He was "totally obscured" by the sago palm. *Id.* p. 52, lines17 24. "Afterwards, I saw him standing up. . . . fully on his feet. . . in a crouch—as in a charging position is what I said." *Id.* p. 53, lines 15-20. When asked if he saw Robbie Tolan on a knee or on his feet completely, Officer Edwards testified that he could not see his feet. *Id.* p. 54, lines 1-3. He also testified that he could not see if he was reaching in his waistband because the potted sago palm on the porch was obscuring his view. He could see, however, that Bobby Tolan "was in basically a hunched charging position. . . .It looked like he was going to go forward, forward motion." *Id.* p. 54, lines 4-19. Officer Edwards turned to face Robbie Tolan and pointed his gun at him, but he did not fire. He then saw one flash from Sergeant Cotton's gun, but heard two shots. *Id.* p. 54, lines 10-24. Robbie Tolan disappeared from his view again, behind the sago palm. *Id.* p. 58, lines 6-10. Officer Edwards called on his radio to report to the police station that shots had been fired. *Id.* p. 59, lines 1-5.

Officer Edwards testified that he did not know that Robbie Tolan was African-American until after the ambulance had left taking him to the hospital. He testified that he knew Cooper was African-American when he was lying on the ground in the front yard. *Id.* p. 68, lines 7-16. He was not able to see into the Nissan automobile as he was following it before Robbie Tolan and Anthony Cooper exited the car at 804 Woodstock. *Id.* p. 69, line15—p.70, line 3. He also testified that reason he followed them was not because they were black. *Id.* p. 65, lines 9-11

Officer Edwards testified that he heard Robbie Tolan say, "Get your fucking hands off my mother." *Id.* p. 70, line 24—p. 71, line 3.

Summary Judgment

Defendants Cotton and Edwards have filed a motion for summary judgment, arguing that they have qualified immunity from the Plaintiffs' claims and that those claims fail as a matter of law. Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure, which mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing of the existence of an element essential to the party's case, and on which that party will bear the burden at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317,322 (1986); Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (*en banc*); *see also Baton Rouge Oil and Chem Workers Union v. ExxonMobil Corp.*, 289 F. 3d 373, 375 (5th Cir. 2002). In deciding a motion for summary judgment, a reviewing court must determine whether the "pleadings, the

discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp.*, 477 U.S. at 322-23; *Weaver v. CCA Indus., Inc.*, 529 F.3d 335, 339 (5th Cir. 2008).

For summary judgment, the initial burden falls on the movant to identify areas essential to the non-movant's claim in which there is an "absence of a genuine issue of material fact." *Lincoln Gen. Ins. Co. v. Reyna*, 401 F.3d 347, 349 (5th Cir. 2005). The moving party, however, need not negate the elements of the non-movant's case. *Boudreaux v. Swift Transp.Co.*, 402 F.3d 536, 540 (5th Cir. 2005). The moving party may meet its burden by pointing out "the absence of evidence supporting the nonmoving party's case." *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 312 (5th Cir. 1995) (quoting *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 913 (5th Cir. 1992).

If the moving party meets its initial burden, the non-movant must go beyond the pleadings and designate specific facts showing that there is a genuine issue of material fact for trial. *Littlefield v. Forney Indep.Sch.Dist.*, 268 F.3d 275, 282 (5th Cir. 2001) (internal citation omitted).

In deciding whether a genuine and material fact issue has been created, the facts and inferences to be drawn from them must be reviewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co.*, 478 U.S. at 587-88; *see also Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410, 412 (5th Cir. 2003). However, factual

controversies are resolved in favor of the non-movant "only 'when both parties have submitted evidence of contradictory facts.'" *Alexander v. Eeds*, 392 F.3d 138, 142 (5th Cir. 2004) (quoting *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 525 (5th Cir. 1999)). The non-movant's burden is not met by mere reliance on the allegations or denials in the non-movant's pleadings. *Diamond Offshore Co. v. A&B Builders, Inc.*, 302 F.3d 531, 545 n. 13 (5th Cir. 2002). Likewise, "conclusory allegations" or "unsubstantiated assertions" do not meet the non-movant's burden. *Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 399 (5th Cir. 2008). Instead, the nonmoving party must present specific facts which show "the existence of a genuine issue concerning every essential component of its case." *American Eagle Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 343 F.3d 401, 405 (5th Cir. 2003) (citation and internal quotation marks omitted). In the absence of any proof, a reviewing court will not assume "that the non-moving party could or would prove the necessary facts,' and will grant summary judgment 'in *any* case where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant.'" *Boudreax*, 402 F.3d at 540 (quoting *Little*, 37 F.3d at 1075) (emphasis in original).

Qualified Immunity

Under the doctrine of qualified immunity, public officials, such as police officers, acting within the scope of their authority are shielded "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional law of which a reasonable person would have known." *Harlow*

v. Fitzgerald, 457 U.S. 800, 818 (5th Cir. 1982); *Gates v. Texas Dep't of Protective and Regulatory Servs.*, 537 F.3d 404,418 (5th Cir. 2008). "Qualified immunity balances two important interests-- the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S.223, 231 (2009). The Supreme Court has characterized the doctrine as protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

To determine whether a government official is entitled to qualified immunity for an alleged constitutional violation, courts conduct a two-prong analysis originally set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), overruled in part by *Pearson*, 555 U.S at 236, which held that the court, contrary to *Saucier's* rigid one, two process, could analyze either prong before analyzing the other prong. The first prong of the *Saucier* analysis asks whether, taken in the light most favorable to the party asserting the injury, the facts alleged show that the official's conduct violated a constitutional right. *See Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 1774 (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). The second prong is a determination of whether, in the light of the specific context of the case, the right was clearly established. *Id.* The second prong of the *Saucier* analysis asks whether qualified immunity is appropriate because the defendants' actions were objectively reasonable "in light of clearly established law at the time of the conduct in question."

See Hampton Co. Nat'l Sur., L.L.C. v. Tunica County, Miss., 543 F.3d 221, 225 (5th Cir. 2008) (quoting *Freeman v. Gore*, 483 F.3d 404, 410-11 (5th Cir. 2007).

In relaxing the two-prong protocol established in *Saucier, Pearson v. Callahan*, 555 U.S. at 236, has clarified that courts are permitted "to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* Thus the "rigid *Saucier* procedure" need not be followed in any particular sequence." *Id.*

Chief Judge Edith H. Jones of the Fifth Circuit Court of Appeals explained in *Ontiveros v. City of Rosenberg, Texas*, 564 F.3d 379, 383, footnote 1,

> Even if the plaintiffs established that the officer used excessive force (and thus performed an unreasonable seizure under the Fourth Amendment), the court would perform an entirely separate inquiry applying a different reasonableness standard. In order to evaluate the "clearly established law" prong of the qualified immunity test, the court must ask whether, at the time of the incident, the law clearly established that such conduct would violate the right. This inquiry focuses not on the general standard--when may an officer use deadly force against a suspect?--but on the specific circumstances of the incident--could an officer have reasonably interpreted the law to conclude that the perceived threat posed by the suspect was sufficient to justify deadly force?

Brosseau v. Haugen, 543 U.S. 194, 199-200 (2004).

The usual summary judgment burden of proof is altered in the case of a qualified immunity defense. *Cf. Gates v. Texas Dep't of Protective and Regulatory Servs.* 537 F.3d 404, 419 (5th Cir. 2008). Although qualified immunity is called an affirmative defense, the defendant asserting qualified immunity does not have the burden to establish it. Rather, it is the plaintiff whose burden it is to negate the assertion of qualified immunity, once it is raised. *Collier v. Montgomery*, 569 F.3d 214, 217 (5th Cir. 2009). An official need only plead his good faith, which then shifts the burden to the plaintiff, who must rebut the defense by establishing that the official's allegedly wrongful conduct violated clearly established law. *See Michalik v. Harmann*, 422 F.3d 252, 262 (5th Cir. 2005) (citing *Bazan v. Hidalgo County*, 246 F.3d 481, 489 (5th Cir. 2001)). The plaintiff, bearing the burden of negating the defense, cannot rest on conclusory allegations and assertions, but must demonstrate genuine issues of material fact regarding the reasonableness of the official's conduct. *Id.* Sergeant Cotton and Officer Edwards have raised qualified immunity in their summary judgment, and "the burden of negating the defense lies with [Marian and Robbie Tolan], even on summary judgment." *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008). In other words the Plaintiffs must satisfy their burden by negating immunity by specifically identifying evidence that rebuts the Defendants' presumed entitlement to dismissal based upon qualified immunity. *Whatley v. Philo*, 817 F.2d 19, 20 (5th Cir. 1987).

To overcome the presumption of a law enforcement officer's qualified immunity, the actions must be viewed from the perspective of a reasonable law enforcement officer on the scene and not in hindsight. "[A] police officer views the facts through the lens of his police experience and expertise." *Ornelas v. United States*, 517 U.S. 690, 699 (1996). Whether a particular use of force is reasonable "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Conner*, 490 U.S. 386, 396 (1989). Only those facts known to the police officer are important to the determination, not facts known only to the plaintiffs and not information subject to a variety of interpretations by individuals who are not experts. *cf. United States v. Banks*, 540 U.S. 31, 39 (2003).

Fourteenth Amendment Claims

Plaintiffs have brought their suit pursuant to Title 42 United States Code, Section 1983, which gives an individual cause of action for violation of a United States Constitutional right by a person acting under color of state law. To state a claim under 42 U.S.C. §1983, a plaintiff must demonstrate: (1) a violation of the United States Constitution or of federal law; and (2) that the violation was committed by someone acting under color of state law. *See. Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 252-53 (5th Cir. 2005) (internal citations omitted).

Section 1983 "is not itself a source of substantive rights." *Baker v. McCollan*, 443 U.S. 137, 145 at fn 3 (1979). It provides "a method for vindicating federal rights elsewhere conferred." *Id.* To support a claim for

under Section 1983, then, a plaintiff must allege a specific constitutional right that has been infringed by the defendant. *Cf. County of Sacramento v. Lewis*, 523 U.S. 833, 842 at fn 5 (1998).

The Plaintiffs have alleged that their Fourteenth Amendment rights to substantive due process of law have been infringed. The Due Process Clause protects against an "exercise of power without any reasonable justification in the service of a legitimate governmental objective" and "government power arbitrarily and oppressively exercised." *County of Sacramento v. Lewis,* 523 U.S. 833, 846 (1998). "[O]nly the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Id.*, quoting *Collins v. Harker Heights*, 503 U.S. 115,129 (1992).

When a provision of the Constitution "provides an explicit textual source of Constitutional protection, a court must assess a plaintiff's claim under that explicit provision and not the more generalized notion of substantive due process." *Cf. Conn v. Gabbert*, 526 U.S. 286, 293 (1999), quoting *Graham v. Conner*, 490 U.S. at 395 (1989). It has been consistently held that a allegations that a law enforcement officer has used excessive force in the course of an arrest, investigatory stop, or other seizure the case must be analyzed under the Fourth Amendment's reasonableness standard, rather than a Fourteenth Amendment substantive due process approach. *Cf. Graham v. Conner,* 490 U.S. at 395. The Plaintiffs' alleged claims for excessive force pursuant to the Fourteenth Amendment must be dismissed as not legally cognizable.

The Plaintiffs have also alleged unconstitutional stops, detentions, and seizures under the Fourteenth Amendment. These claims too are not cognizable under the Fourteenth Amendment. The Supreme Court of the United States in modern times has reserved the protections of substantive due process to matters relating to marriage, family, procreation, and the right of bodily integrity. *Cf. Albright v. Oliver*, 510 U.S. 266, 272 (1994). The Fourteenth Amendment was drafted to protect matters of pretrial deprivations of liberty. *Id.* at 274. An unlawful detention claim cannot fall under the umbrella of a violation of substantive due process. The Plaintiffs' claims for detention brought pursuant to the Fourteenth Amendment must also be dismissed.

Plaintiffs have also brought suit against Sergeant Cotton and Officer Edwards for their alleged violation of their Equal Protection rights under the Fourteenth Amendment. The Equal Protection Clause requires that similarly situated persons be treated alike. *Rolf v. City of San Antonio*, 77 F.3d 823, 828 (5th Cir. 1996). An equal protection challenge to actions under the color of state law pursuant to the Equal Protection Clause can be successful "[o]nly if the challenged government action classifies or distinguishes between two or more relevant groups of people. *Outb v. Strauss*, 11 F. 3d 488, 492 (5th Cir.), *cert. denied*, 511 U.S. 1127 (1994). The Plaintiffs "must prove that similarly situated individuals were treated differently." *Bryan v. City of Madison*, 213 F.3d 267, 276 (5th Cir. 2000). The Plaintiffs have alleged their personal beliefs that race was a factor in the adverse actions taken against them by the Defendants in this case, but such a personal belief, unsubstantiated, cannot support their claim of denial of equal protection of the laws. *Edwards v.*

Woods, 51 F.3d 577, 580 (5th Cir. 1995). The Plaintiff must allege and ultimately prove facts that show such an improper motivation. *Allen v. Thomas*, 388 F.3d. 147, 149 (5th Cir. 2004), *Jones v. Greninger*, 188 F.3d 322, 325 (5th Cir. 1999). Officer Edwards testified that he did not know the Robbie Tolan and Anthony Cooper were African American until they refused to submit to temporary detention. He did not know that Mr. and Mrs. Tolan were African American until they stepped outside on the porch of their house. Doc. 67, Exhibit 4, p 66, lines 7-16; p. 79, lines 5-11; page 19, lines 4-12. Sergeant Cotton testified that he did not know of the race of any of the Plaintiffs until after he exited his police car at the Tolan residence. Doc. 67, Exhibit 2, page 34, lines 13-19. There is simply no admissible evidence Plaintiffs can point to that contradicts this testimony, nor any admissible evidence that either officer was motivated to act due to the race of any of the Plaintiffs. To succeed on a claim of denial of equal protection Plaintiffs must show that Sergeant Cotton's or Officer Edwards's actions were not rationally related to a legitimate state objective or that either of them have treated similarly situated individuals of another race differently under the same or similar circumstances. *Cf. Bryan v. City of Madison*, 213 F.3d at 277. Again, Plaintiffs have pointed to no admissible evidence to establish this claim. Plaintiffs' claim for denial of equal protection under the Fourteenth Amendment must be denied.

Fourth Amendment Claims

"Fourth Amendment claims are appropriate [only] when the complaint contests the method or basis of the arrest and seizure of the person." *Jones v. City of*

Jackson, 203 F.3d 875, 880 (5th Cir. 2000), quoting *Brooks v. George County, Miss.*, 84 F.3d 157, 166 (5th Cir. 1996).

"The Fourth Amendment prohibits unreasonable seizures, not unreasonable or ill-advised conduct in general. Consequently, [the courts] scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment." *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993), quoting *Carter v. Buscher*, 973 F.2d 1328, 1333 (7th Cir. 1992).

Stop and Detention of Robbie Tolan, Anthony Cooper, Marian Tolan, and Bobby Tolan

A police officer has the authority to stop and detain briefly an individual in order to perform an investigation based upon reasonable suspicion of possible criminal activity. *Goodson v. City of Corpus Christi*, 202 F.3d 730, 736 (5th Cir. 2000), citing *Terry v. Ohio*, 3932 U.S. 1, 30 (1968). Only a minimum level of objective justification, considering the totality of the circumstances, is required for a constitutionally permissible investigative stop and detention. *United States v. Michelletti*, 13 F.3d 838, 840 (5th Cir. 1994); *see also United States v. Ibarra-Sanchez*, 199 F.3d 753, 759 fn. 5 (5th Cir. 1999). Whether an investigative detention is justified does not depend upon a confirmation of the officer's suspicions that an offense has been committed, nor does it depend upon how likely it is that the officer's suspicions are correct. *Cf. Jewett v. Anders*, 521 F.3d 818, 823-27 (7th Cir. 2008).

Justification to detain a suspect for any suspected offense is a complete defense to an unlawful arrest

claim under Section 1983 if any reasonable police officer could have believed that reasonable suspicion could have existed. *Cf. Pfannstiel v. City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990). During an investigative detention it is lawful for officers to "take such steps as are reasonably necessary to protect their personal safety and to maintain the *status quo* during the course of the stop." *United States v. Hensley*, 469 U.S. 221, 235, (1985); *United States v. Campbell*, 178 F.3d 345, 348-349 (5th Cir. 1999); *United States v. Sanders*, 994 F.2d 200, 210 (5th Cir. 1993).

The Texas Penal Code, Section 38.15, addresses interference with a law enforcement officer's public duties, and under that statute a person commits an offense when, with criminal negligence that person interrupts, disrupts, impedes, or otherwise interferes with a peace officer while the peace officer is performing a duty or exercising authority imposed or granted by law. "Indeed, citizens have no right to intervene in lawful police business." *Mouille v. City of Live Oak*, 977 F.2d 924, 928 (5th Cir. 1993).

It is unclear whether the Plaintiffs are even arguing that the investigative detentions they experienced were unreasonable, but under the factual circumstances of the case, the investigative detentions were reasonable. Officer Edwards was patrolling before two a.m. in an area where there had been a number of car thefts; he was driving behind a Nissan SUV, which he saw making a hurried turn onto Woodstock Street, a street he knew to be a *cul-de sac*; when he saw the SUV park on Woodstock, he followed it down the street. Officer Edwards typed the SUV's license plate number into his police car computer, and the computer reported the

SUV stolen. Officer Edwards was unaware that he had typed one digit of the number incorrectly. He called for back up and waited. He next saw the two male occupants of the automobile, Robbie Tolan and Anthony Cooper, exit it and proceed to walk towards a home on the street. Officer Edwards then exited his police car, drew his service weapon, and shouted for the two men to "come here," which they did not do; they continued to walk to the house. The two men shouted verbal abuse at Officer Edwards and asked him "why?" He informed them he believed their automobile to be stolen. He also shouted to them to get down on the ground, which the two men also did not do. He called for backup. Quickly thereafter two occupants of the home Marian and Bobby Tolan exited the home, and told the two men to obey the police. At the request of Officer Edwards the man from the house, Bobby Tolan, went to stand by the automobile parked in the driveway. The woman from the house, Marian Tolan, started to walk around the yard. She was upset and loudly protested the police presence. At some point in this very short space of time Sergeant Cotton arrived, received a very short briefing from Officer Edwards and proceeded to take Marian Tolan, in hand. Up to that point the facts are undisputed in the record. There was a report of a stolen vehicle, which the officers had information was the SUV parked in front of the house on Woodstock Street; this justified the officers to investigate whether the SUV was stolen and whether the former occupants of the SUV or the former occupants of the house had an involvement in the theft of the SUV. Marian Tolan was walking around the yard, getting in the way of Officer Edwards's pointed weapon, upset, angry, and loudly protesting the innocence of her son and nephew, and refusing to stand

in a safe place next to the garage. The activities warranted Sergeant Cotton's efforts to calm her and put her into a neutral position. Reasonable suspicion existed to temporarily detain the Plaintiffs, the individuals associated with the reportedly stolen vehicle. This brief detention did not violate their rights under the Fourth Amendment. *Cf. Terry v. Ohio*, 392 U.S. 1 (1968).

Reasonable suspicion also existed to briefly detain the Tolans and Cooper after Robbie Tolan was shot. "The permissible scope of a *Terry* stop has expanded [] to include the use of handcuffs and temporary detention in squad cars." *United States v. Stewart*, 388 F.3d 1079, 1084 (7th Cir. 2004). Cooper was handcuffed, searched, and placed in a police car by a Bellaire police officer other than Sergeant Cotton or Officer Edwards. At that point Cooper was still a potential car theft suspect. Marian and Bobby Tolan were each also placed in police cars by other officers. The exigent circumstances in the immediate aftermath of the shooting and the need to protect the integrity of the investigation of the stolen automobile and Sergeant Cotton's use of force raised reasonable suspicion to justify the brief detention of the Tolans and Anthony Cooper. Compare *Mouille*, 977 F. 2d at 928; see also *Illinois v. Lidster*, 540 U.S. 419, 426-427 (2004); *Walker v. City of Orem*, 451 F.3d 1139, 1148 (10th Cir. 2006), discussing unreasonableness of detaining mere witnesses.

After other Bellaire police officers determined their identities and that the automobile in question was not stolen, Mr. and Mrs. Tolan and Anthony Cooper were released. There is no question that under *Terry* the

investigative detention of all four individuals, Anthony Cooper (detained in a police car for approximately an hour) and Marian and Bobby Tolan (detained in police cars for twenty-five minutes) was constitutional. More importantly however, these post-shooting detentions were made by other Bellaire police officers not by the Defendants, Sergeant Cotton and Officer Edwards.

Use of Excessive Force

An allegation that an officer used excessive force in the course of a seizure does not create a separate unconstitutional detention claim distinct from the excessive force claim. See. *Flores v. City of Palacios*, 381 F.3d 391, 403 (5th Cir. 2004). A plaintiff may not support an alleged unlawful detention claim by alleging that an officer used excessive force during the detention. *Cf. Id.*

In order to prevail on an excessive force claim, a plaintiff must show (1) some injury; (2) which resulted directly and only from a use of force that was clearly excessive to the need; and (3) the excessiveness of which was objectively unreasonable. *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 382 (5th Cir. 2009).

BOBBY TOLAN

Marian and Bobby Tolan both testified that neither Officer Edwards, nor Sergeant Cotton used any force against Bobby Tolan. His claims against Sergeant Edwards and Officer Edwards for use of excessive force against him must be dismissed.

ANTHONY COOPER

Anthony Cooper was also not subjected to use of excessive force. In his deposition he testified that he thought Officer Edwards had put him in handcuffs, and the handcuffs were uncomfortable. Doc. 67, Exhibit 16, page 90, line 11 -- page 91, line 24. It is undisputed that another officer put Anthony Cooper in handcuffs, and even if Officer Edwards did, the use of handcuffs in the manner to which Anthony Cooper testified cannot support a claim of use of excessive force. *Cf. Tarver v. City of Edna*, 410 F.3d 745, 751-52 (5th Cir. 2005). "An officer may handcuff a suspect when 'reasonably necessary to maintain the status quo and protect [officer] safety during an investigative stop.'" *Young v. Prince George's County*, 355 F.3d 751, 755 (4th Cir. 2004), quoting *United States v. Taylor*, 857 F.2d 210, 213 (4th Cir. 1988). Anthony Cooper's claim of excessive force must be dismissed.

MARIAN TOLAN

Marian Tolan makes no allegation that Officer Edwards used any force against her. Doc. 67, Exhibit 17, p. 18, line 25 --page 19, line 7; page 19, line 21-page 20, line 11. Marian Tolan's claim against Officer Edwards for use of excessive force must be dismissed.

Marian Tolan has made a claim of use of excessive force against Sergeant Cotton in taking her arm and later pushing her against the garage door. A police officer is not subjected to liability because he uses force while carrying out his duties, and he cannot be held responsible for unexpected consequences of the use of necessary force. Hill v. Carrol County, 587 F.3d 230,

237 (5th Cir. 2009). "Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to affect it." *Graham*, 490 U.S. at 396. "'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment.'" *Id.*, quoting *Johnson v. Glick*, 481, F.2d 1028, 1033, cert denied, 414 U.S. 1033 (1973). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation." *Id.*, at 396-397.

Marian Tolan, who was upset, walking around the yard, and shouting, was an individual out of control. There is no dispute about that. Sergeant Cotton needed to bring her under control, quiet her down, and have her stand in one place, so that he could hand cuff Robbie Tolan, who was by that time lying prone, on his stomach, on the porch of the home and search him for weapons. He also needed to hand cuff Cooper, who was lying on his back in the front yard and search him for weapons. This was a dangerous and uncertain scene. In such a situation officers must stop and control suspects and other persons' movements so that they can safely confirm the identities of unknown persons before they can safely identify and handcuff, and verify the information and the suspects. *Cf. Jewett v. Anders* , 521 F.3d F3d 827 (7th Cir. 2008). When Marian Tolan refused to stand next to the garage door as Sergeant Cotton requested, he took her right arm, put his left arm in the small of her back and began to walk her

toward the garage. Robbie Tolan, watching from his prone position, with his head over his left shoulder, testified that while Sergeant Cotton was moving to the garage door area, he was holding Marian Tolan's arm, "kind of pushing her a little bit, kind of directing her." Robbie Tolan further testified that "There was no tussle. I mean, but she – she wasn't exactly running over there either." *Id.* p 80, lines 3-24. Robbie Tolan's description of these particular events are completely consistent with Sergeant Cotton's recollection. Then, just before Sergeant Cotton and Marian Tolan reached the garage door, Sergeant Cotton pushed Marian Tolan, and she hit the garage door with what several witnesses described as a loud banging sound. Mrs. Tolan believed that Sergeant Cotton had maliciously slammed her into the metal garage door. Sergeant Cotton testified that he pushed her because after he heard Robbie Tolan shout words to the effect of "Get your fucking hands off her," he saw Robbie Tolan getting up and he wanted to get Marian Tolan out of the way so that he could deal with Robbie Tolan. Anthony Cooper testified that when Marian Tolan hit the garage door Robbie Tolan said, "What are you doing to my mom--doing to my mom?" Doc. 70, Exhibit 7, page 78, lines 17-25. Whether Sergeant Cotton pushed Marian Tolan before or after Robbie Tolan's shout is immaterial to the issue to be determined. Did Sergeant Cotton use excessive force to move Marian Tolan to a neutral place so that he could continue the investigation? Marian Tolan had injected herself into the police investigation by refusing to comply with Sergeant Cotton's requests to move out of the way. She obviously did not see the situation in the same way Sergeant Cotton saw it, but looking at the scene objectively, Sergeant Cotton's actions were reasonable.

Taking her arm and walking her toward the garage was not an excessive use of force, nor was pushing Marian Tolan away once he heard the shout and saw Robbie Tolan in the act of getting up from a prone position. Forcefully and intentionally shoving or pushing a woman into a metal garage door could be excessive force under other circumstances, but the circumstances here were tense and unusual. There is no question that within a matter of seconds three things happened: (1) Robbie Tolan shouted at Sergeant Cotton, "Get your fucking hands off her; (2) Robbie Tolan quickly began to move from his prone position facing the front door 180 degrees around to a position, as he testified, on his knees facing Sergeant Cotton, and (3) Marian Tolan hit the garage door with a loud noise. "There can be a constitutional violation only if injuries resulted from the officer's use of excessive force. Injuries which result from, for example, an officer's justified use of force to overcome resistance to arrest do not implicate constitutionally protected interests." Johnson v. Morel, 876 F2d 477, 479-80 (5th Cir. 1989) (*en banc*). If any of the elements of a claim under this test fails, so does the plaintiff's claim. *Id.* Viewed objectively, the force Sergeant Cotton used to push Marian Tolan, it was not excessive to the need, nor unreasonable under the circumstances. *Cf. Collier v. Montgomery County*, 569 F.3d 214, 219 (5th Cir. 2009). Marian Tolan's claim of use of excessive force against Sergeant Cotton must be dismissed.

ROBBIE TOLAN

There is no allegation that Officer Edwards used any force whatsoever on Robbie Tolan. The only allegation he makes against Officer Edwards is that

Officer Edwards negligently typed into his police car computer the wrong license plate number. Doc. 67, Exhibit 15, page 59, line 18 -- page 60, line 21; page 61, line 11 -- page 62, line 10. In *Fraire v. City of Arlington*, 957 F. 2d 1268, 1276 (5th Cir. 1996), Fifth Circuit Judge Jacques Weiner wrote on behalf of the panel, "The constitutional right to be free from unreasonable seizure has never been equated by the Court with the right to be free from a negligently executed stop or arrest." Robbie Tolan's claim against Officer Edwards for excessive use of force must be dismissed.

Robbie Tolan argues that Sergeant Cotton used deadly force that was objectively unreasonable under the circumstances, when Sgt. Cotton shot him. Sergeant Cotton testified that he fired the shot in self defense because he feared for his life, believing Robbie Tolan was pulling a weapon from his waistband area. Robbie Tolan maintains that there are genuine issues of material fact as to whether Sergeant Cotton's use of deadly force was objectively reasonable. Moreover, he argues "the material fact issues [are] heavily disputed." Doc. 70 at 21. Robbie Tolan and Sergeant Cotton are the only two people who can provide factual information regarding the observations Sergeant Cotton made, which led him to fire.

Plaintiffs base their main argument that there are material fact questions precluding summary judgment on the differences in details of the testimony of the various eye witnesses on three inter-related subjects: (1) when Robbie Tolan told Sergeant Cotton to get his hands off his mother, either before or after Mrs. Tolan hit the metal door of the garage, causing a loud metallic banging sound, (2) exactly where Robbie Tolan

was vertically located when he was shot, and (3) where Robbie Tolan's hands were as he was getting from his horizontal position, prone and on his stomach on the porch, with his head facing in the opposite direction of the garage, to his vertical position facing Sergeant Cotton at the time he was shot.

Robbie Tolan, Marian Tolan, Anthony Cooper, and Officer Edwards all testified that Robbie Tolan yelled to Sergeant Cotton after Marian Tolan hit the garage door. Sergeant Cotton testified that Robbie Tolan yelled to him before he pushed Marian Tolan away, and she hit the garage door. Sergeant Cotton testified, "I do not disagree that the noise [of Mrs. Tolan hitting the garage door] happened. . . . I disagree as to when the noise happened." *Id.*, Exhibit 1, page 61, line 7 through page 62, line 18. The fourth eye witnesses, Bobby Tolan, did not hear his son shout at Sergeant Cotton. This disputed fact is not material to the determination of the issue of qualified immunity. It is not disputed that Robbie Tolan shouted at Sergeant Cotton and quickly got up from his prone position and turned his body around.

Plaintiffs argue that Sergeant Cotton has been inconsistent in his testimony concerning where Robbie Tolan's hands were at the time he was shot. They highlight Sergeant Cotton's deposition testimony, in which, they argue, he does not disagree with the premise that the Tolans' testimony concerning whether Robbie Tolan was reaching for a gun at the time Sergeant Cotton shot him or was "on a knee" when he was shot was conflicting. The last quoted question and answer from Sergeant Cotton's deposition reads

> Question: Well, their statement is different from your statement. Do you understand that?
>
> . . . .
>
> Answer: I don't think I can answer entirely--I suppose there are some things in their statement that are different.

Doc. 70, Ex. 1, page 73, lines 17-18 and 21-23

Plaintiffs do not quote the objection to the question, "misrepresents the record." *Id.* at page 73, lines lines 19-20. Nor do they quote the continuation of Sergeant Cotton's answer to the question, "I would have to go back and read--you know I don't think I can answer that here." Doc. 71, Ex. 33, page 73, lines 24--page 74, line 1. Defendants' Reply to Plaintiffs' Opposition to Defendants' Edwards and Cotton, Motion for Summary Judgment (Doc. 71) quotes extensively from excerpts from Sergeant Cotton's deposition (Ex. 32 and 33) that give the complete back and forth between Plaintiffs' attorney and Sergeant Cotton on the issue of Sergeant Cotton's disagreement with the testimony of Robbie and Marian Tolan. *Id.* at 16-19. In none of these excerpts does Sergeant Cotton acquiesce that there is a material difference between his testimony and that of the Tolans.

The Plaintiffs also argue that the testimony concerning where Robbie Tolan was vertically situated just before he was shot creates material fact questions that would prohibit summary judgment on the defense of qualified immunity. The testimony differs among the witnesses in the case. Paragraph 21 of Plaintiffs' Opposition to Defendants' Edwards' and Cotton's

Motion for Summary Judgment states, "In response to Cotton shoving Marian Tolan against the garage door, Robbie Tolan yelled at Cotton to get his hands off his mother, brought his arms to his chest, and pushed himself up onto his knees." Doc. 70 at 6-7. Robbie Tolan testified to this at the trial of Sergeant Cotton. Doc. 70, Exhibit 3, vol. 2, page149, lines 22-23.

At his deposition Robbie Tolan's testimony was similar to his trial testimony. He testified that he was lying on the ground[3] on his stomach, with his arms out in front of him and his head turned to the left. In order to get up he drew back his hands to from where they were to "about mid body" and had to push up with both his hands in a "kind of push up maneuver." As he was pushing up he was also turning towards his left. *Id.*, Exhibit 6, page 100, line 9--page 101, line 8. Robbie Tolan testified later in the deposition, "I didn't jump up off the ground. I just simply got up. Started to get up." *Id.* Exhibit 6, page 110, lines 12-13. "Before I could stand up, I was shot." *Id.* Exhibit 6, page 146, line 14.

Marian Tolan, gave similar testimony at Sergeant Cotton's trial:

> Question: When you were slammed into the garage door what happened next Ms. Tolan?

---

[3] He was actually on the porch of the house. Throughout the trial testimony and deposition testimony it is often referred to by various witnesses as "the ground."

Answer: Robbie said something like get your fucking hands off my mom or you don't have to shove my mom. Something to that nature. . . .

Question: And Robbie was still laying upon the porch with his head next to the door?

Answer: Yes. Yes. But he was still looking. When I hit the garage door and I looked at him and he looked to the right and then he looked to the left and when he looked to the left is when he addressed him. . . .

Question: Ms. Tolan Robbie was shot in the front of his chest. How would the bullet get there if he didn't get up?

Answer: You mean was he standing?

Question: Was Robbie getting up off of the ground facing you and this officer?

Answer: Yes.

Question: Okay

Answer: On his knees. He was not standing

Question: How far up did Robbie make it?

Answer: I think he -- it seems to me he was on his knees. He was by then up on his knees.

Question: Okay.

Answer: At an angle.

Question: What happened when he got up on his knees?

Answer: He was shot.

Id., Exhibit 9, vol. 2, page 104, line 7-- page 105, line 16.

Officer Edwards testified at Sergeant Cotton's trial, "I heard a bang [the sound of something hitting the metallic garage door] and then he--the gentleman [Robbie Tolan] laying behind the Sego Palm either said don't touch my mama or something. . . .which drew my attention back to him because I saw his hands had disappeared." *Id.*, Exhibit 4, vol 1, page 64, lines 18-25 through page 65, lines 1 through 16. After Robbie Tolan's hands disappeared, Officer Edwards testified "His head and shoulders had then disappeared behind the -- [Sego Palm]. . . . I couldn't see him anymore behind that bush." *Id.*, Exhibit 4, vol. 1, page 65, lines 16-25. To the question, "What happened next," Officer Edwards answered, "Then I saw his head and shoulders come up above the bush and he was turned towards--facing Cotton and appeared to be charging or rushing." *Id.*, Exhibit 4, vol. 1, page 66, lines 1-4. Officer Edwards elaborated that he appeared to be charging or running, " 'cause his shoulders and head were kind of hunched when he was getting up. . . . Like fixing to take off." Id., Exhibit 4, vol. 1, page 65, lines 23 through page 66, line 1.

Sergeant Cotton testified at his deposition that when he had almost gotten Mrs. Tolan to the garage

door, she told him to take his hands off her. About that time he looked over at Robbie on the porch, then had his attention back on Mrs. Tolan when he "heard Robbie yelling. . . . get your fucking hands off her." Sergeant Cotton and Mrs. Tolan had not yet made it to the garage door when he heard Robbie Tolan's yelling. It was then that he pushed Mrs. Tolan out of the way, and she hit the garage door with a bang. *Id.*, Exhibit 1, page 60, line 7-- page 18. Sergeant Cotton testified that when he heard Robbie Tolan yell, he looked at him, and "[Robbie Tolan] was getting up and turning around. *Id.*, Exhibit 1, page 61, line 25--page 62, line 1. Sergeant Cotton did not know where Robbie Tolan was when he yelled at him. *Id.* Exhibit 1, page 62, line 15. Sergeant Cotton further testified that "At some point in the altercation [Robbie Tolan] was leaning in my direction. *Id.*, Exhibit 1, page 62, lines 18-19. Sergeant Cotton did not see him move his hands and push himself off the ground in a push-up maneuver. *Id.*, Exhibit 1, page 64, lines 20-25. When Sergeant Cotton heard Robbie Tolan yell he looked over and saw that "he was up in a crouch kind of in the process of getting up with his feet under him facing kind of away from me while--as he was rotating to his right." *Id.*, Exhibit 1, page 65, lines 2-5. Sergeant Cotton testified that Robbie Tolan was not running toward him, but turning around to face Sergeant Cotton. He was on both feet. *Id.* Exhibit 1, page 65, 20-- 66, line 3.

Contrary to Plaintiffs' argument in their Response, Document 70, paragraph 22, Sergeant Cotton did not testify that Robbie Tolan stood to his full height on his feet. There is no testimony in this summary judgment record that Robbie Tolan was standing up, except his own testimony cited in Defendants' reply to Plaintiffs'

response (Doc. 71). Robbie Tolan testified at Sergeant Cotton's criminal trial, "After I was shot the bullet lifted me to my feet and against the front door." Doc. 71, Exhibit 32, vol. 1, page 96, 12-13. This testimony is not material to a determination of where Robbie Tolan was situated immediately before he was shot.

Similarly, Plaintiffs' argument in paragraph 24 of Document 70 is flawed. Officer Edwards did not testify that Robbie Tolan "charged" Sergeant Cotton. His testimony was Robbie Tolan stood "fully on his feet. . . . in a crouch--as in a charging position. . . ." Doc. 70, Exhibit 5, page 53, lines 15-22. When asked later, however, if Robbie Tolan was on one or both of his knees, Officer Edwards testified that he could not see Robbie Tolan's feet. *Id*, Exhibit 5, page 54, line 3. He maintained nevertheless that Robbie Tolan "was in basically a hunched charging position. . . . It looked like he was going to go forward, forward motion." *Id.*, Exhibit 5, page 54, lines 15-19. Officer Edwards later testified, "I couldn't see [Robbie Tolan's] hands--his knees or his feet." *Id.*, Exhibit 5, page 56, lines 9-10 In Officer Edwards testimony at the trial of Sergeant Cotton he testified that at first he could see Robbie Tolan's hands above his head and his legs straight out behind him as he lay on his stomach on the porch. Then Robbie Tolan disappeared completely behind the sago palm plant. Then he saw Robbie Tolan's "head and shoulders come up above the bush and he was turned towards -- facing Cotton and he appeared to be charging or rushing." *Id.*, Exhibit 4, page 66, lines 2-16. He further testified that Robbie Tolan appeared to be charging or running, " 'cause his shoulders and head were kind of hunched when he was getting up. . . . like fixing to take off." *Id.*, Exhibit 4, page 66, line 22--page

67, line 1.[4] Although Officer Edwards refers to Robbie Tolan's position in terms of movement, it is clear that Officer Edwards is not testifying that Robbie Tolan was actually moving towards Sergeant Cotton, but, rather, was in a position to begin movement towards Sergeant Cotton.

What remains is a dispute as to whether Robbie Tolan was on his knees, as he and his mother testified or crouched on his two feet as Sergeant Cotton testified. In any event there is no dispute that in a matter of a very few seconds Robbie Tolan went from a prone position lying on the porch with his arms and head facing in the opposite direction to the garage door, the place Sergeant Cotton and Mrs. Tolan were standing, to a position, from Officer Edwards's viewpoint, behind the potted sago palm, with his head and shoulders above the palm, facing Sergeant Cotton and his mother. He was not yet fully standing up, nor was he moving towards Sergeant Cotton, but he was in the process of standing up. The facts that he quickly got up from a prone position on the porch, yelled to Sergeant. Cotton to take his "fucking hands" off his mother, and turned around to face Sergeant Cotton are material facts, and about them there is no dispute.

Plantiffs' argue that "Robbie Tolan did not reach for his waistband area." Document No. 70 at Paragraph 23. Robbie Tolan testified that he did not reach for his waistband area, and we now know that he did not have a weapon of any kind. Document No. 70, Exhibit 3, vol.

---

[4] The remainder of the testimony on page 67 is it is garbled and impossible to understand.

2, page 152, lines 8-11. Sergeant Cotton testified at his deposition that as Robbie Tolan was getting up, as he was rotating to his right, his right arm was at his waistband and he did not know where his left arm was. Doc 70, Exhibit 1, page 65, lines1-8. He then clarified that "at his waistband" meant "In the middle, middle of his waist. . . . Like where his belt buckle would be." *Id.*, Exhibit 1, page 65, lines 9-15. Robbie Tolan was wearing a hoodie that was not tucked into his pants, but was hanging over them. Sergeant Cotton testified that in his experience he found it to be often the case that people carried weapons "in their midsection in their waistband." *Id.*, Exhibit 1, page 65, line 16--page 66, line 1. He was then asked if he hadn't testified at his criminal trial that "he was digging in his waistband." *Id.*, Exhibit 1, page 66, lines 3-4. After checking the transcript of his trial testimony Sergeant Cotton answered,

> Yeah. It says 'like he was digging in his waistband.' That's a description trying to give a description of what he was doing. . . . 'like' meaning that his hand was in that area. . . . I don't -- but I don't -- I don't mean that to mean, though, that he was reaching down inside of his pants necessarily. That's not --that wouldn't be accurately what I saw. . . . It appeared that he was drawing a weapon from his waistband. . . . Oh, I don't know that I could see his hand specifically. I could see where his hand was, but, you know, his clothing was probably covering the hand. It was dark. I could see his total movement, which is what made me believe that

it wasn't necessarily just where his hand was, for instance.

Id., Exhibit 1, page 66, line 12 -- page 67, line 16

Plaintiffs argue in Document 70, paragraph 3 that this quoted explanation and clarification of his trial testimony in fact presents a "different version of the facts," and that Sergeant Cotton has disputed the material facts about which he testified previously, which Plaintiffs characterize as ". . . he shot Robbie Tolan because Tolan was 'digging' in his waistband."

In fact, Sergeant Cotton testified at his trial

Answer: I pushed [Mrs. Tolan] and took probably at least a step away from her and turned to face [Robbie Tolan] and began to draw my weapon.

Question: What did you see that caused your concern?

Answer: His hand was coming from his waistband, from the middle of his --

Question: Can you turn around and demonstrate for the jury?

Answer: As he was--his hand was like this. This is where his right hand was in the middle of his waist.

Question: Okay

Answer: Like he was digging in his waistband.

Doc. 70, Exhibit 2, page 127, lines 7-17

These two quoted passages, one from his deposition and one from his trial testimony do not present "different versions of the facts." Sergeant Cotton has not changed his testimony. In his deposition Sergeant Cotton further testified that he knew that Robbie Tolan's hand was in the vicinity of his waistband; Robbie Tolan was not running towards him, but was turning around to face Sergeant Cotton; Robbie Tolan was on both feet. *Id.*, Exhibit 1, page 67, line 17 -- page 68, line 3.

There is also no dispute that (1) the situation was tense, (2) Sergeant Cotton was new to the situation, (3) Sergeant Cotton needed to calm and have stay in one place one of the persons on the scene, Mrs. Tolan, who was being disruptive and getting in the line of fire of Officer Edwards' pointed weapon, (4) Sergeant Cotton had been informed that the two persons "on the ground," and (5) Robbie Tolan, who was lying prone on the front porch of the house, and Cooper, who was lying on his back in the yard, were suspected of felony automobile theft.

In order to conduct the investigation Sergeant, Cotton asked Mrs. Tolan to stand next to the door of the garage. When she failed to co-operate, he took one of her arms and put his hand on her back and guided her towards the garage door. In the next few seconds, as they got close to the garage door, either before or after Sergeant Cotton pushed Mrs. Tolan away and

into the garage door, Robbie Tolan yelled to Sergeant Cotton, "get your fucking hands off my mother," and Sergeant Cotton saw Robbie Tolan get up from his prone position into a crouching position, either on his knees or feet, and rotate his body around to face Sergeant Cotton. Robbie Tolan testified at his deposition that he was, in fact, getting up and turning around to face Sergeant Cotton. At this point in the time line there are no genuine issues of material fact in dispute.

Sergeant Cotton further testified it was at this point in the time line that he also saw Robbie Tolan's hand in the vicinity of his waistband and believed that Robbie Tolan was in the process of pulling out a firearm. Sergeant Cotton feared for his life and fired three shots, one of which hit Robbie Tolan, severely wounding him.

The fact that Robbie Tolan did not reach for his waistband area is not material to the determination of whether Sergeant Cotton should be entitled to the defense of qualified immunity. Rather, it is the reasonable officer's perception of the situation that decides qualified immunity. "An officer's use of deadly force is presumptively reasonable when the officer has reason to believe that the suspect poses a threat of serious harm to the officer or to others." *Ontiveros v. City of Rosenberg*, 564 F.3d at 382 (5th Cir. 2000); accord *Manis v. Lawson,* 585 F.3d 839, 844 (5th Cir. 2009). It is of no moment that a suspect is ultimately found not to have posed a risk of serious harm. "The sad truth is that [the suspect's] actions alone could cause a reasonable officer to fear imminent and serious physical harm" that justifies the use of deadly force.

Reese v. Anderson, 926 F.2d 494, 500-501 (5th Cir. 1991). "No right is guaranteed by federal law that one will be free from circumstances where he will be endangered by the misinterpretation of his acts." *Young v. City of Killeen*, 775 F.2d 1349, 1353 (5th Cir. 1985).

Plaintiffs' contend in their response to the motion for summary judgment that Robbie Tolan angrily shouted, "get your fucking hands off my mother," got up on his knees, rotated his body around to face Sgt. Cotton, and did not make any movements towards his waistband area. Defendants argue that the totality of these circumstances would have led a reasonable officer to perceive that he was under threat of serious harm, regardless of "whether any of the claimed discrete disputed facts existed or occurred." Doc. 71, at 5.

The issue to be decided is not whether Sergeant Cotton, but any reasonable officer could have evaluated the totality of the circumstances confronting Sergeant Cotton that early morning and reached the decision that under the law deadly force was permissible.

Defendants rely upon the sworn statements of two experts, William Lewinski (Doc. 67, Exhibit 27), an expert in the training and evaluation of police officer shootings and the analysis of human perception, memory, and reaction time, and Lieutenant Albert Rodriguez (Doc. 67, Exhibit 29), an expert in police training. Lieutenant Rodriguez's deposition is Doc. 67, Exhibit

Lieutenant Rodriguez testified in his deposition concerning the issue of whether a reasonable officer, in the circumstances confronting Sgt. Cotton, would

reasonably believe that Robbie Tolan was about to draw a weapon from his waistband:

> Question: And is moving his arms though they are at his side and pulled toward his body, though they are at his side, that gives the officer in the totality of the circumstances, moving his arms to his side without moving them toward his body, that is enough to make the officer think that the--make Sergeant Cotton think that Robbie Tolan is reaching for his waistband, is that your testimony?
>
> Answer: Sir, I believe a push-up position is, as he [Robbie Tolan] describes it, a push-up position is somewhere close to his body not out away from his body. And when he turns, based on the totality of the circumstances, I believe based on how Texas police officers are trained that a reasonable law enforcement officer could have perceived that deadly force, could have had a reasonable belief that deadly force was immediately necessary.
>
> Question: And is it your testimony that you believe that Robbie Tolan testified that he pulled his arms toward his body?
>
> Answer: I believe he said his midsection, his hands were brought to about the midpoint of his body in a push-up position.

* * *

Question: Now, since I just read it to you, I am asking whether you concluded from reading that, that his hands moved toward his waistband?

Answer: Again, my conclusion, sir was based on how law enforcement officers are trained. And I believe the way Texas police officers are trained that based on a getting up from a prone position, hands have to be close to the body. And if he turns, those hands are going to be somewhere in the waistband area, if he turns very quickly as he describes. So I believe that they are going to be-- I believe they are going to be very close to the waistband area. And I believe that he said -- he says that he is turning at the time that he was shot. So based on how law enforcement officer's --trained, a reasonable officer could reasonably believe that he is reaching for the waistband.

Doc. 67, Exhibit 28, page 56, line 24 -- 57, line 57; page 61, line 19 --page 62, line 19.

In his report Lieutenant Rodriguez states:

70. Contemporary law enforcement training does not advocate for police officers to wait until they positively confirm that a suspect has a weapon before the use of deadly force is justified. . . .[A] suspect's actions are going to be faster than the officer's reaction. Law enforcement training specifically addresses the fact that a suspect can access a firearm from the waistband and shoot before an officer can react

to shoot. Officers are trained to understand that even if the officer is able to shoot at the same time that the suspect fires, it is of no advantage to the officer. Shooting at the same time the suspect does means the officers could also get killed or seriously injured.

Doc. 67, Exhibit 29, paragraph 70, page 23.

Mr. Lewinsky's report is in a similar vein:

16. Someone who is defiantly non-compliant and whose hands are in, going to, or appear to be going to their waistband area, certainly creates a very real threat to the officer. Even in baseball, the average batter in a pro game has approximately a half a second (travel time of the ball from the pitcher's mound to home plate) to react to the ball. In this type of situation the officer has half that time or less to read and then react to that situation.

17. It is obvious but worthy to note that all thought and action take time. The more complicated the decisions and actions are or the more dynamic the circumstances of the decision, then the longer the decision and action will usually take to complete. However, it is clear that the perception of threat, the decision to start shooting, the drawing of a gun from a holster, the alignment of the gun and the actual completion of the trigger pull take time. Reactive behavior of all kind takes time. From our peer reviewed research we know that the average officer, under good laboratory conditions can

> react to a clear stimulus, pull a gun from a level two holster and fire one shot from (depending upon when they start shooting as the gun is coming up) one and one half to one and nine tenth seconds. Even if the officer has their gun out, their finger on the trigger with the slack taken out of the trigger, with their gun aimed and ready, and the officer attentive and ready to react--the average officer would take just under a third of a second to pull the trigger, in the clearest possible circumstances. Subsequently even in the fastest possible reaction scenarios the officer can be shot at, twice before they can react and shoot back. This definitely puts the officer behind the reaction curve in this type of situation.

Doc. 67, Exhibit 27, paragraphs 16 and 17.

Plaintiffs offer no summary judgment evidence to rebut this expert evidence, and they have identified no evidence in this record that could prove that there is not one reasonable police officer who would have perceived a threat of serious injury from Robbie Tolan's quick and aggressive actions. Sergeant Cotton misinterpreted Robbie Tolan's intended actions, but his firing on Robbie Tolan did not violate Robbie Tolan's constitutional rights because Sergeant Cotton feared for his life and could reasonably have believed the shooting was necessary under the totality of the factual circumstances evidenced by the summary judgment record. Robbie Tolan's claims of excessive force against Sergeant Cotton must be dismissed.

Having considered all issues raised in the Defendants' motion for summary judgment for qualified immunity, the Court finds that the Plaintiffs have not established that Defendants' Jeffrey Wayne Cotton and John C. Edwards violated their constitutional rights. Accordingly, it is hereby

ORDERED that Defendants' Jeffrey Wayne Cotton's and John C. Edwards's Motion for Summary Judgment (Doc. 67) is GRANTED.

SIGNED at Houston, Texas, this 31st day of March, 2012.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12-20296

[Filed August 1, 2013]

ROBERT R. TOLAN; MARIAN TOLAN,

Plaintiffs - Appellants

v.

JEFFREY WAYNE COTTON,

Defendant Appellee

Appeals from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC
(Opinion 25 April 2013, 713 F.3d 299)

Before JONES, BARKSDALE, and SOUTHWICK, Circuit Judges.

PER CURIAM:

The court having been polled, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. And 5th Cir. R. 35), rehearing en banc is DENIED.

Voting for en-banc rehearing were: Judge James L. Dennis, Judge Jennifer Walker Elrod, and Judge James E. Graves, Jr. Voting against were: Chief Judge Carl E. Stewart, Judge Carolyn Dineen King, Judge E. Grady Jolly, Judge W. Eugene Davis, Judge Edith H. Jones, Judge Jerry E. Smith, Judge Edith Brown Clement, Judge Edward C. Prado, Judge Priscilla R. Owen, Judge Leslie H. Southwick, Judge Catharina Haynes, and Judge Stephen A. Higginson.

Upon the filing of this order, the clerk shall issue the mandate forthwith. *See* Fed. R. App. P. 41(b).

ENTERED FOR THE COURT:

/s/ Rhesa Hawkins Barksdale
RHESA HAWKINS BARKSDALE
UNITED STATES CIRCUIT JUDGE

DENNIS, Circuit Judge, joined by GRAVES, Circuit Judge, dissenting:

I respectfully but emphatically dissent from the court's failure to rehear this case en banc. The panel opinion contains three serious errors that should be corrected by this court en banc or by the Supreme Court: (1) The panel opinion erroneously assumes that the Supreme Court's decision in *Pearson v. Callahan*, 555 U.S. 223 (2009), authorizes it to skip the first prong of the *Saucier v. Katz*, 533 U.S. 194 (2001),

analysis and grant Sergeant Jeffrey Wayne Cotton qualified immunity, despite there being no argument or evidence that Cotton's actions were based on his reasonable mistake of law; consequently, the panel opinion does not correctly apply either prong of the *Saucier* analysis, but uses a confused jumble of parts of each prong to justify its decision and reach the wrong conclusion; (2) The panel opinion erroneously and misleadingly represents that there is no genuine issue as to any material fact in this case; (3) The panel opinion erroneously and misleadingly represents facts that are genuinely disputed as being undisputed.

1.

In *Saucier v. Katz*, the Court mandated a two-step sequence for resolving government officials' qualified immunity claims. First, "a court must decide whether the facts that a plaintiff has alleged (see Fed. R. Civ. P. 12(b)(6), (c)) or shown (see Rules 50, 56) make out a violation of a constitutional right." *Pearson*, 555 U.S. at 232(citing *Saucier*, 533 U.S. at 201). Second, "if the plaintiff has satisfied this first step, the court must decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right. *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

In *Pearson*, the Court held that while the sequence set forth in *Saucier* is often appropriate, it should no longer be regarded as mandatory. *Id.* at 236. "The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion

in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* Importantly, the Court in *Pearson* did not change the substance or the purpose of the two *Saucier* prongs. It merely recognized that lower courts should have the discretion to decide whether following the two prongs in sequence as originally set forth by *Saucier* is worthwhile in particular cases. *Id.* at 242.

The panel opinion, in a very confused and erroneous manner, claims that it "do[es] not reach whether Sergeant Cotton's shooting Robbie Tolan violated his Fourth Amendment right against excessive force (as noted, the district court relied on this first prong of qualified-immunity analysis)." *Tolan v. Cotton*, 713 F.3d 299, 306 (5th Cir. 2013). Instead, the panel opinion concludes that "showing violation of a constitutional right does not end the inquiry when qualified immunity properly has been invoked. Sergeant Cotton is entitled, through summary judgment, to qualified immunity under the second prong of the analysis." *Id.*

After the panel opinion states that it will use only the *Saucier* second prong analysis to decide this case, one would expect it to address whether Cotton made a reasonable mistake of law in using deadly force against Robbie, for that is the purpose of the second prong.[1]

---

[1] *See Saucier*, 533 U.S. at 205 ("The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual

But it does not do so. Indeed, the panel opinion does not correctly apply either *Saucier*'s substantive first-prong factual analysis or its second-prong legal analysis. Instead, it applies an amalgam of the two: something that it called a second-prong legal analysis but which has all the earmarks of a first-prong fact-intensive inquiry. As a result, the panel opinion, in making a purported second-prong inquiry, fails entirely to assess whether an objective officer in Cotton's position could have made a mistake of law and instead performs what appears to be an erroneous, partial, and distorted *Saucier* first-prong analysis to conclude that summary judgment based on qualified immunity is proper. *See Tolan*, 713 F.3d at 307-08. Why does the panel opinion announce that, unlike the district court, it will not use the first *Saucier* prong to start its analysis of this case? A proper application of the first prong, including a proper application of summary judgment law as well as a proper application of *Graham v. Connor*, 490 U.S. 386 (1989), and *Pearson* would have correctly led only to the conclusion that there are genuine issues as to material facts whether Cotton objectively and reasonably feared for his life when he shot to kill Robbie; and that the parties' submissions, properly viewed favorably to the plaintiff, could show that the officer's conduct violated clearly established Fourth Amendment law. Why does the panel opinion say that it will use the *Saucier* second

---

situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.")

prong only, but end up using mostly first-prong language in its reasoning? A *Saucier* second-prong inquiry was not an appropriate starting point because Cotton never testified that he shot Robbie because he made a reasonable mistake as to the legal constraints on his particular conduct in this case. If the panel had asked and answered these questions it could have avoided its mistakes and the unfortunate circuit precedent it makes in this case.

2.

In pursuing its confused *Saucier* second prong analysis, the panel opinion further compounds its errors by representing that several genuinely disputed material facts are really undisputed and by incorrectly representing that the disputed facts are not material. Specifically, the panel opinion presumes that the Tolans' front porch was not well lit despite the plaintiffs' evidence that it was reasonably well lit by lights on the porch, in the yard, and from Officer John Edwards's car spotlight and his flashlight; that Marian Tolan was argumentative and refused orders to remain calm, though she and her husband testified that she was calm and merely explained to both officers that she and her husband owned the Nissan and house and that Robbie lived there with them; that Cotton merely guided Marian toward the garage door despite the Tolans' testimony that he dragged her and shoved her into the metal garage door; and that Robbie moved to intervene in Cotton's treatment of Marian, despite the Tolans' testimony and physical blood-spot evidence that indicated that Robbie had not moved toward Cotton when Cotton shot him. The parties also dispute whether Cotton slammed Marian against the garage

door before or after Robbie began to get up, turned toward Cotton, and told him to unhand his mother; whether Robbie was kneeling or crouching when Cotton shot him; where Robbie's hands were and whether he reached toward his waistband; and whether Cotton issued any verbal warning before shooting Robbie with deadly force. Ultimately, the panel opinion's pro-defendant recitation of facts fails to address evidence that, when viewed in the light most favorable to the plaintiff, creates genuine issues of material fact as to whether an objective officer in Cotton's position could have reasonably and objectively believed that Robbie posed an immediate, significant threat of substantial injury to him.

Resolving the disputed facts reasonably in favor of the plaintiffs, the evidence shows that when Cotton arrived at the Tolans' residence, the Nissan that Edwards had misidentified as stolen was parked in front of the house, Robbie and Cooper were prone on the porch and on the ground, respectively, Bobby—Robbie's father—had his hands against the other car in the driveway, and Marian—Robbie's mother, a middle-aged woman in her pajamas whom Cotton believed to be the homeowner—was explaining to Edwards that she and Bobby owned the Nissan while Edwards had his pistol trained on Robbie and Cooper. Marian and Bobby had already explained to Edwards that he was mistaken in believing the Nissan to be stolen, that they owned the house and the Nissan, that Robbie lived with them, and that Robbie and Cooper were their son and nephew, respectively. Robbie was prone on the porch toward and near the front door of the house. When Cotton arrived, Marian explained to Cotton that she and Bobby owned the Nissan, the house, and that

Robbie was their son. Cotton immediately ordered Marian to move to the garage door. She began to comply, then stopped to again explain the officers' mistake to Cotton. Cotton grabbed her arm, pulled her to the garage, and slammed her up against it so hard that she slid to the ground. At this point, Cotton had a clear and full view of Robbie who was lying approximately 15 to 20 feet away. When Robbie saw and heard his mother being thrown against the garage door, he pushed himself up and turned around to face Cotton while saying, "get your fucking hands off my mom." Without issuing any warning, Cotton unholstered his weapon, pointed it at Robbie, and shot at him three times, striking him once in the chest. The force of the bullet drove him backwards against the front door, leaving his blood stain near the front door. The bullet collapsed Robbie's lung and lodged in his liver. Robbie was squatting or on his knees when he was shot. Robbie had no weapon and had not made any sort of reaching movement toward his waistband. Edwards trained his weapon on Robbie when he heard Robbie speak, but did not issue a warning or fire his weapon. The officers found, belatedly, that the Nissan had not been reported stolen and that neither Robbie, Cooper, nor any of the Tolans were armed.

Taking the undisputed facts of this case and resolving the disputed facts reasonably in the nonmovant plaintiffs' favor, the summary judgment record clearly shows that a jury reasonably could find that Cotton used excessive force against Robbie and Marian and that he did not warrant qualified immunity because the law was so clearly established that an objectively reasonable officer in Cotton's position would have known that his actions violated

Robbie and Marian's Fourth Amendment rights. Only by failing to adhere to proper summary judgment law and by misapplying the two-prong qualified immunity analysis was the panel opinion able to conclude otherwise.

CONCLUSION

The panel opinion erroneously interprets the Supreme Court's decision in *Pearson* to authorize it not only to skip the first prong of the *Saucier* analysis, but also to misapply as its *Saucier* second-prong analysis an amalgam of both prongs, so that it applies neither prong fully and correctly. Also, the panel opinion misapplies summary-judgment law by dismissing undisputed facts as inconsequential and resolving material facts genuinely at issue in the defendant's favor rather than in favor of the plaintiff. If the panel opinion had applied the *Saucier* prongs correctly it would have concluded that the facts that the plaintiffs have shown make out a violation of their constitutional right to be free from excessive and deadly force by a police officer; that this right was "clearly established" at the time that Cotton violated their rights by using excessive force against Marian Tolan and deadly force against Robbie Tolan; and that Officer Cotton is not entitled to qualified immunity because, under the facts shown by the parties' submissions, a reasonable jury could find that an objectively reasonable officer would have known that Robbie Tolan did not pose an immediate, significant threat to the officer's life and that the officer's use of deadly force without forewarning was therefore not justifiable.

APPENDIX E

Transcript Excerpts

**IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
232ND JUDICIAL DISTRICT**

Trial Court No. 1210528

May 6, 2010

EXCERPT OF PROCEEDINGS

STATE OF TEXAS	)
Appellant	)
	)
VS.	)
	)
JEFFREY COTTON	)
Appellee.	)
	)

**Excerpts of Direct Examination of
Robert Ryan Tolan**

* * *

[p.145]

* * *

I had been in the house for 15 years, I went to Bellaire High School. I wasn't a stranger. I had been there so

when he refused to listen I'm saying hey this is my car, this is my house, this is where I live. No get on the ground. Get on the ground. Now I'm getting a little irritated.

Q. Do you start mouthing off?

A. No. I just kept asking him why. Why? No, sir this is my car. Sir this is my car. This is my house. I live here.

* * *

Excerpts of Robert R. Tolan
Deposition Transcript,
October 26, 2010

* * *

[p.110]

* * *

Q. (BY MR. HELFAND) What is it that you did or said that you think indicated you had no intention of coming toward the officer?

A. Well, sir, I didn't jump up off the ground. I just simply got up. Started to get up. So --

Q. Okay.

A. I mean, he could have yelled at me to get back down, or could have just pointed his gun at me but he didn't. He pointed and fired. So --

* * *

[p.150]

* * *

A. I didn't run at him. I didn't jump up and make any crazy movements.

Q. All right. You don't think getting up off the ground when you have been told to lay down and turning around and screaming at the officer is a crazy movement at the time?

A. Crazy? No, sir. At the time, no, sir. Sir, I was not screaming. They were just words.

* * *

Excerpts of Jeffrey Cotton Deposition Transcript, November 15, 2010

* * *

[p.84]

* * *

Q. (By Mr. Berg) Okay. You didn't say, Stop?

A. I did verbalize, yes.

Q. What did you say?

A. Either stop or no.

Q. As he was -- as you perceived him getting up?

A. Yes.

Q. Okay. What was his response to your verbalization?

A. There was no change in his response.

Q. He continued reaching for his waistband?

* * *

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
232ND JUDICIAL DISTRICT

Trial Court No. 1210528

May 6, 2010

EXCERPT OF PROCEEDINGS

STATE OF TEXAS	)
Appellant	)
	)
VS.	)
	)
JEFFREY COTTON	)
Appellee.	)
	)

Excerpts of Direct Examination of
Marian Tolan

* * *

[p.104]

* * *

A. Yes. Yes. But he was still looking. When I hit the garage door and I looked at him and he looked to the right and then he looked to the left and when he looked to the left is when he addressed him. And --

Q. What happened next?

A. The officer did not say a word. He didn't say get back down. He didn't say stay down. He didn't say a word. He just shot.

Q. Did Robbie get up?

A. No, sir.

* * *

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
DEC 19 2013
OFFICE OF THE CLERK

No. 13-551

In The
Supreme Court of the United States

ROBERT R. TOLAN,

Petitioner,

v.

JEFFREY WAYNE COTTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & AUGHTRY

WILLIAM S. HELFAND
Counsel of Record
NORMAN RAY GILES
1200 Smith Street, Suite 1400
Houston, Texas 77002-4401
(713) 654-9630
Fax: (713) 658-2553
bill.helfand@chamberlainlaw.com
Attorneys for Respondent

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED FOR REVIEW

In *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808 (2009), this Court unanimously stated the standards which control analysis of a police officer's assertion of qualified immunity. The doctrine of qualified immunity protects police officers acting under color of law, provided their conduct does not violate clearly established rights of which a reasonable officer would have known. Evaluation of immunity requires the determination of whether a plaintiff has shown: (1) any violation of a constitutional right; and (2) that the right at issue was clearly established at the time of the officer's alleged misconduct. While a plaintiff must satisfy both prongs of this test to overcome an officer's immunity, only the second prong is actually a question of immunity. The first prong of the test answers the question of whether the evidence shows a constitutional deprivation occurred at all. The second prong of the test, which is the actual immunity inquiry, is a determination of the objective legal reasonableness of the challenged action, analyzed in light of the legal principles that were clearly established at the time it was undertaken. Judges have discretion to decide the order in which to evaluate the two prongs of the analysis.

Even though this Court has specifically held the protection of qualified immunity applies regardless of whether an officer makes a mistake of law, mistake of fact, or mistake based on a mixture of law and

QUESTION PRESENTED FOR REVIEW
– Continued

fact, Tolan nonetheless seeks review based upon the contention that factual issues pertaining to the reasonableness of an officer's conduct may only be evaluated when determining whether a constitutional deprivation occurred and asserts that a reviewing court errs when it considers mistakes of fact during evaluation of immunity. No circuit court has adopted the position Tolan urges this Court to apply which would unreasonably narrow the immunity analysis. Tolan bases his argument on nothing more than a mischaracterization of most circuit courts' decisions to evaluate immunity in two steps which comprehensively address the standard this Court has established. While this Court has not added a third numeral to the test for immunity, it nonetheless demands that analysis of the objective legal reasonableness of an officer's conduct be evaluated even though it has no numeral of its own in the stated test. Thus, Tolan's claimed circuit conflict is illusory. This Court has previously held, regardless of whether a court evaluates immunity in a one or two step analysis, the result nonetheless is that analysis of the facts regarding objective legal reasonableness is necessary to evaluate immunity. Accordingly, this Court and the circuit courts have already answered the question Tolan presents. Courts deciding qualified immunity must consider the relevant facts to address the objective legal reasonableness of a police officer's conduct when deciding qualified immunity.

PARTIES

Petitioner is Robert R. "Robbie" Tolan.

Respondent is Jeffrey Wayne Cotton.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. The procedural history of the case shows that Tolan's claims have been thoroughly evaluated 2

B. The District Court and the Fifth Circuit thoroughly analyzed and recited the factual record that underlies their decisions 4

SUMMARY OF THE ARGUMENT 17

REASONS FOR DENYING THE WRIT 18

I. This Court has long held analysis of qualified immunity requires examination of facts necessary to identify the particular context of the case so that objective legal reasonableness can reliably be evaluated 19

II. The Fifth Circuit appropriately evaluated the record in accordance with this Court's standard 25

III. Decisions of other circuits do not suggest confusion regarding the immunity standard 32

TABLE OF CONTENTS – Continued

Page

IV. Any police officer could reasonably have believed Sergeant Cotton's response to Tolan's actions would be permitted under clearly established law 35

CONCLUSION 38

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034 (1987) ..... *passim*

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986) 25

Ashcroft v. al-Kidd, 563 U.S. ___, 131 S.Ct. 2074 (2011) 24, 33

Bernini v. City of St. Paul, 665 F.3d 697 (8th Cir. 2012) 28

Brosseau v. Haugen, 543 U.S. 194, 125 S.Ct. 596 (2004) 29, 32

Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894 (1978) 24

Findlay v. Lendermon, 722 F.3d 895 (7th Cir. 2013) 28

Gould v. Davis, 165 F.3d 265 (4th Cir. 1998) 28

Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865 (1989) 21

Groh v. Ramirez, 540 U.S. 551, 124 S.Ct. 1284 (2004) 23

Hare v. City of Corinth, 135 F.3d 320 (5th Cir. 1998) 29

Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982) 20, 36

Hensley v. Gassman, 693 F.3d 681 (6th Cir. 2012) 28

TABLE OF AUTHORITIES – Continued

Page

Johnson v. Jones, 515 U.S. 304, 115 S.Ct. 2151 (1995) 26

Krueger v. Fuhr, 991 F.2d 435 (8th Cir. 1993) 26, 31

Maldonado v. Fontanes, 568 F.3d 263 (1st Cir. 2009) 27

Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092 (1986) 24, 33, 34

Messerschmidt v. Millender, ___ U.S. ___, 132 S.Ct. 1235 (2012) 20, 33

Morse v. Frederick, 551 U.S. 393, 127 S.Ct. 2618 (2009) 33

Ontiveros v. City of Rosenberg, 564 F.3d 379 (5th Cir. 2009) 30, 31, 32

Pearson v. Callahan, 555 U.S. 223, 129 S.Ct. 808 (2009) ..... *passim*

Pierce v. Smith, 117 F.3d 866 (5th Cir. 1997) 29

Priester v. Riviera Beach, 208 F.3d 919 (11th Cir. 2000) 22

Ryder v. City of Topeka, 814 F.2d 1412 (10th Cir. 1987) 31

Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151 (2001) ..... *passim*

Schneider v. Smith, 653 F.3d 313 (3d Cir. 2011) 28

Scott v. Harris, 550 U.S. 372, 127 S.Ct. 1769 (2007) 26

TABLE OF AUTHORITIES – Continued

Page

Stanton v. Sims, ___ U.S. ___, 134 S.Ct. 3 (2013) 24, 34

Thompson v. Hubbard, 257 F.3d 896 (8th Cir. 2001) 31

Tolan v. Cotton, 713 F.3d 299 (5th Cir. 2013) 3, 24, 30

Tolan v. Cotton, ___ Fed.Appx. ___, 2013 WL 3948950 (5th Cir. 2013) 4

Walczyk v. Rio, 496 F.3d 139 (2d Cir. 2007) 27, 32, 33, 34

Wilkerson v. Seymour, ___ F.3d ___, 2013 WL 6153874 (2013) 28

Wilson v. Lane, 526 U.S. 603, 119 S.Ct. 1692 (1999) 37

Zalaski v. City of Hartford, 723 F.3d 382 (2d Cir. 2013) 27

FEDERAL STATUTES

28 U.S.C. § 1254(1) 1, 18

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

42 U.S.C. § 1983 1

RULES

FED.R.CIV.P. 54(b) 1

Supreme Court Rule 10 ..... 18, 19

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

Fourth Amendment 1, 21, 32

JURISDICTIONAL STATEMENT

Respondent does not dispute this Court's jurisdiction over this case under 28 U.S.C. § 1254(1) but denies the case satisfies the standard of Supreme Court Rule 10. Tolan filed a petition for writ of certiorari on October 29, 2013. The Fifth Circuit Court of Appeals had jurisdiction over Tolan's appeal from the District Court's final judgment under 28 U.S.C. § 1291 and it affirmed the District Court's judgment in favor of Sergeant Cotton under FED.R.CIV.P. 54(b) on April 25, 2013. [ROA. 2712, 2716]. The District Court had original jurisdiction over Tolans' claims under 28 U.S.C. § 1331 and it granted final summary judgment on April 30, 2012. [ROA. 2570, 2627, 2715].

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Tolan correctly stated the Fourth Amendment and provisions of 42 U.S.C. § 1983.

STATEMENT OF THE CASE

A. The procedural history of the case shows that Tolan's claims have been thoroughly evaluated.

Petitioner, Robert (Robbie) Tolan[1] filed suit against Respondent Bellaire police Sergeant Jeffrey Cotton claiming Cotton used unreasonable force by shooting Tolan in the course of an investigative stop. [ROA. 4]. Sergeant Cotton timely answered and asserted defenses, including qualified immunity. [ROA. 92]. After discovery, Sergeant Cotton filed a motion for summary based upon qualified immunity and objections to exhibits Tolan filed in opposition to Sergeant Cotton's summary judgment motion. [ROA. 908, 2212, 2261, 2375, 2387, 2395]. Tolan filed responses in opposition to summary judgment and responses to Sergeant Cotton's objections. [ROA. 1830, 2336, 2350].

The District Court entered a well-reasoned order that showed a thorough analysis of the evidence and sustained Sergeant Cotton's objections to inadmissible items Tolan submitted in opposition to the motion for summary judgment. Unfortunately, Tolan persists in citing and relying upon the inadmissible items as support for his argument in this Court, as he also did in the Fifth Circuit Court. [ROA. 2570, Tolan brief at

---

[1] Robert R. Tolan will be referred to as "Robbie Tolan" in some portions of the brief to avoid any confusion between him and his father Robert "Bobby" Tolan.

page 7, citing App. 96]. The inadmissible items are identified as ROA. 2088-2093, 2107-2109, 2119-2135, 2144-2183, 2184-2207, 2570.

The District Court entered a memorandum and order in which it granted Sergeant Cotton's motion for summary judgment finding no violation of the Fourth Amendment [ROA. 2627], and entered final summary judgment in Sergeant Cotton's favor. [ROA. 2626]. Tolan filed a motion for clarification of the final judgment [ROA. 2705] and the District Court entered an amended final summary judgment in favor of Sergeant Cotton [ROA. 2715]. Tolan filed an initial notice of appeal [ROA. 2712], and subsequent amended notice of appeal [ROA. 2716].

The Fifth Circuit Court of Appeals affirmed the judgment in Sergeant Cotton's favor based upon his qualified immunity, characterizing the District Court's decision as based upon "an extremely detailed and well-reasoned opinion." *Tolan v. Cotton*, 713 F.3d 299, 303 (5th Cir. 2013). However, the Court chose, as it may under Supreme Court authority, to evaluate Sergeant Cotton's claim to immunity under the "clearly established law" portion of the immunity test. *Id.* at 306-309. The Circuit Court found that Tolan failed "to show a genuine dispute of material fact for whether Sergeant Cotton's conduct was objectively reasonable in the light of clearly established law." *Id.* at 306 (internal citation omitted).

Tolan petitioned the Fifth Circuit Court of Appeals for rehearing en banc but that request was denied.

Tolan v. Cotton, ___ Fed.Appx. ___, 2013 WL 3948950 * 1 (5th Cir. 2013) (not designated for publication). Fifth Circuit Judges James L. Dennis, joined by Circuit Judge James E. Graves, Jr., filed an opinion dissenting from the Fifth Circuit's denial of rehearing en banc. *Id.* In his dissenting opinion, Judge Dennis credits inadmissible evidence [ROA. 2107-2109] that was specifically identified and appropriately stricken by the District Court [ROA. 2570-2571]; a ruling that was never properly challenged on appeal. Before this Court, Tolan continues to utilize inadmissible evidence by relying on the dissent's impermissible references to excluded evidence. [Tolan brief App. 96-99].

B. The District Court and the Fifth Circuit thoroughly analyzed and recited the factual record that underlies their decisions.

While investigating a reported stolen vehicle, Officer John Edwards had four people to watch so he notified the dispatcher to hurry back-up officers to the scene. [ROA. 2628, 1114, 1115, 1013, 1019, 1025, 1110]. When back-up officer Sergeant Cotton arrived, Robbie Tolan was lying prone on the porch; Anthony Cooper was on the ground, not necessarily prone; Bobby Tolan was standing next to a vehicle parked in the driveway [ROA. 992, 1031-1032]; and Marian Tolan was walking around in the front yard. [ROA. 992, 1032, 1114-1115, 2628]. When he arrived, Sergeant Cotton understood he was investigating a stolen vehicle, with two suspects. Thirty-two seconds after

he arrived, and before the scene was secure, Sergeant Cotton shot Robbie Tolan in self-defense.

Robbie Tolan's Testimony

Robbie Tolan saw Sergeant Cotton near Cooper and observed Cotton "grab [Robbie's] mother." [ROA. 1240-1243]. Sergeant Cotton grasped Marian Tolan's arm and guided her parallel to the front of the house and toward the garage door. While Sergeant Cotton moved toward the garage door, he held Marian Tolan's arm, "kind of pushing her a little bit, kind of directing her." "There was no tussle. . . . but she wasn't exactly running over there either." [ROA. 1244-1246]. When Sergeant Cotton and Marian Tolan reached the garage door, they were "pretty much directly behind [Robbie Tolan]." [ROA. 1248]. Still prone on the porch, facing toward Sergeant Cotton, Robbie Tolan turned only his head to the left and looked backwards to follow Sergeant Cotton and Marian Tolan's movement. Robbie Tolan "saw and heard Sergeant Cotton push [Tolan's] mom against the garage door. . . . And it made a loud noise." [ROA. 1249]. The sight and sound of his mother being pushed against a metal garage door "caused [Robbie Tolan] to want to get up from the position that [he was] laying in. . . . because [he was] upset about seeing [his] mother being pushed into a garage door." [ROA. 1250].

> Question: [A]m I correct in saying that not only did you want to get up from the position of 'RT' [the position in which he was lying on his

stomach on the porch], but you wanted to turned [sic] around to where your mother and Sergeant Cotton were?

Answer: That I wanted to, yes, sir.

Question: In fact, that's what you were doing at the time you were shot, right?

Answer: True.

Question: You were getting up and turning around toward your mother and Sergeant Cotton?

Answer: True.

[ROA. 1250].

While he was lying prone on the porch, Robbie Tolan had his arms outstretched in front of him. In order to get up he had "to pull [his] arms back towards kind of [his] chest area and push up. . . ." He "used kind of like a push up maneuver to get [himself] up." [ROA. 1259]. He was "turning, . . . pushing up with [his] hands, and turning towards [his] left." [ROA. 1260].

Question: [Y]ou've been asked to talk about kind of the mechanics of getting up that night. Right?

Answer: Yes.

Question: Just like we're doing here, we're talking about pulling your hands back, push up with both hands, and at the same time that you're turning around, right?

Answer: Yes, sir.

Question: Okay. But, would it be right for me to say, Mr. Tolan, that at the time that you were getting up that morning, would it be right for me to say you really weren't thinking about how you were doing it, right?

Answer: Sure.

Question: In other words, people have asked you, how were you doing it, and you have tried to kind of recreate it in your mind and describe it, right?

Answer: Yes, sir.

Question: But in terms of each thing that you were doing at the moment you were doing it, would it be right for me to say it's not something you were thinking about at the moment that you were doing it?

Answer: Sure.

Question: So when you give us a recreation of it, it is your best guess of how you were doing it, right?

Answer: Sure.

[ROA. 1260, 2018, 2495, 2496].

Question: Now, so as you're getting up and I think you told me you're turning to your left as you're getting up?

Answer: Yes, sir.

Question: Okay. And is Sergeant Cotton – as you're turning towards Sergeant Cotton, and getting up, is Sergeant Cotton still holding your mother by the arm?

Answer: To my knowledge, yes.

Question: Okay. And as you're getting up and turning to your left – by the way, did you get up quickly or slowly?

Answer: Pretty quickly, I suppose.

Question: All right. And as you're getting up, did you scream or raise your voice and say, "Get your fucking hands off my mom?"

Answer: Yes, sir.

Question: You were angry by then, right?

Answer: Yes, sir.

Question: And, so, if somebody said they saw an angry look on your face, you would say, well, that would probably be right, right?

Answer: Sure.

Question: And you would agree with me, wouldn't you, that saying something like "get your fucking hands off my mom" is an aggressive statement? You would agree with that, wouldn't you?

Answer: Sure.

[ROA. 2499-2500].

Question: And in turning, are you – were you able to see Sergeant Cotton's face as you are turning towards him?

Answer: Yes, sir.

[ROA. 2500].

Question: Did you see Sergeant Cotton actually unholster his weapon?

Answer: Yes, sir.

Question: And would it be right for me to say that you did not see Sergeant Cotton unholster his weapon until you were beginning to get up and turning [sic] toward him?

Answer: Yes, sir.

Question: In other words, from what you observed, Sergeant Cotton's weapon was holstered up until the time that you hollered to him and began getting up and turning toward him.

Answer: Sure.

Question: And then he unholsters his weapon, right?

Answer: Yes, sir.

Question: Points it at you, and at the same time, practically immediately, is shooting, right?

Answer: Yes, sir.

[ROA. 2501].

Question: The first thing that Sergeant Cotton did after he fired his weapon was to come over to [Robbie Tolan] and check [Tolan] for weapons . . . And when he didn't find a weapon, he said to [Tolan], what were you reaching for, right?

Answer: True.

[ROA. 2508].

Marian Tolan's Testimony

Marian Tolan's testimony generally supported her son's account. She was asked, "Robb[ie] had gotten up from lying down on the ground, . . . without anybody giving him permission to do it or telling him it was okay to do it, when Sergeant Cotton shot him, right?" She answered "Yes." [ROA. 1449]. She was asked, "[h]e was going from laying on the ground to not laying on the ground?" She answered, "Yes." She was

asked "[h]e was in the process of getting up when he got shot, wasn't he?" She answered "Yes." [ROA. 1449]. Later in her deposition she was asked, "At the time that Sergeant Cotton fired at Robb[ie], as Robb[ie] was getting off the ground, had anyone checked yet to see whether Mr. Cooper or Robb[ie] Tolan had a weapon?" She answered "No." The next question posed to her was "[w]hether either of those gentlemen had a weapon at the time that Sergeant Cotton responded to Robb[ie] getting up off the ground, can we agree was uncertain?" She answered "It was uncertain." [ROA. 1463]. Marian Tolan also tes ed that, after Sergeant Cotton pushed her against the garage door, Robbie Tolan immediately started to get up from the ground. He hollered to Sergeant Cotton "to get his hands off of his mom." [ROA. 1489]. When asked if he actually said "[g]et your fucking hands off my mom," and she answered, "I don't recall him using that word, but he says he did." [ROA. 1490]. Marian Tolan agreed it was only after Robbie rose from the porch, began turning toward Sgt. Cotton and screamed an aggressive verbal exclamation that Sergeant Cotton shot Robbie Tolan. [ROA. 1490]. She was asked if Sergeant Cotton withdrew his weapon from its holster before firing. She responded, "I didn't see it until then." [ROA. 1490]. The three gunshots came immediately after each other, with no delay, and it sounded like one gunshot to her. [ROA. 1490]. After the shooting, Sergeant Cotton called paramedics first and then asked Marian Tolan, "Is there anyone else in the house?" When Marian Tolan said, "No," Sergeant Cotton went over to Robbie, "Turned him over and

emptied his pockets and said, 'What were you reaching for?'" [ROA. 1491]. Marian Tolan agreed that, from the moment Sergeant Cotton arrived on the scene until the time he fired his weapon was just 32 seconds, all of the time, by her own admission as things were tense and uncertain. [ROA. 1493].

Sergeant Cotton's Testimony

As Sergeant Cotton responded to assist Officer Edwards around 2:00 a.m. he heard information the vehicle was stolen. [ROA. 1012, 1020, 1022]. Sergeant Cotton heard Officer Edwards broadcast that the felony suspects were moving, and "that he was going to have to take them, meaning he was going to have to address the suspects right now before backup was going to be able to get there." [ROA. 1022]. Officer Edwards later transmitted that back-up needed to hurry. [ROA. 1026]. Sergeant Cotton noticed tension in Officer Edwards's voice and Sergeant Cotton "perceived [Officer Edwards] was in a dangerous situation." [ROA. 1027]. Upon arriving on the scene, Sergeant Cotton saw Officer Edwards standing in the front yard with his gun drawn. Sergeant Cotton saw Bobby Tolan standing to his left in the yard and Marian Tolan "moving around the front yard." Sergeant Cotton saw "at least" Anthony Cooper lying on the sidewalk. He did not see Robbie Tolan at first. Marian Tolan "was in dynamic movement, so [Sergeant Cotton] doesn't remember the specific spot that she was in. She was moving around from Officer Edwards' left to in front of him to his right, kind of all

in that area in front of him." Officer Edwards was pointing his gun toward Cooper and Robbie Tolan. [ROA. 1028-1030].

Sergeant Cotton drew his handgun and moved to Officer Edwards. Officer Edwards told Cotton "the two on the ground had gotten out of the stolen vehicle." By then, Sergeant Cotton could see a part of Robbie Tolan's hands or head sticking out past the planter on the porch. [ROA. 1031-1032]. Sergeant Cotton believed it necessary to search and handcuff the suspects but Marian Tolan was in front of Officer Edwards's pointed gun, "so [Sergeant Cotton] needed to get her controlled before [he] could move onto the suspects." Although Marian Tolan was "putting herself between [Officer Edwards's] weapon and Anthony Cooper and Robbie Tolan," Sergeant Cotton did not interpret her actions as trying to block a shot from Officer Edwards's gun. Rather, "she was just moving around kind of not really paying attention to the gun, just very agitated and – and upset and moving kind of all over the scene." [ROA. 1032]. She was also talking as she moved. Sergeant Cotton paraphrased her comments, "What are you doing here, we live here, you shouldn't be here, those kinds of things." [ROA. 1032-1033]. The exterior lighting consisted of a gas lamp "out front," which shed "some, but not a lot" of light, "more decorative than – than illuminating" and two spotlights on the driveway. The area in which Cooper was situated was better lit than the porch, which was "fairly dark." Robbie Tolan was lying "with his feet toward the driveway and his head toward the front door," with his arms stretched out in front of him,

"more like Superman" than an airplane, and his fingertips "pointing towards the front door." [ROA. 1034-1035].

After speaking to Officer Edwards, Sergeant Cotton's attention focused on Marian Tolan, whose behavior "heightened [his] tension." [ROA. 1035-1036]. "I identified her as being part of a scene that was out of control that was going to have to be controlled before we could move forward." [ROA. 1036]. "What needed further control was that both the felony suspects needed to be cuffed and searched," and at that point Marian Tolan was "hindering [his] ability to cuff and search the two felony suspects." [ROA. 1036]. Sergeant Cotton asked Marian Tolan "several times" to move to the garage door. Her response was "noncompliant, kind of argumentative. She was upset and continuing to protest." [ROA. 1036-1037]. Marian Tolan said, "[w]e live here, what are you doing here, you shouldn't be here, and that's our car." Sergeant Cotton's only response "was to tell her to calm down, to let us do our investigation, we'll work everything out," yet she was still noncompliant. Marian Tolan "maybe took one or two steps towards the garage door, and then stopped and began protesting again." They were not close to the garage door, but "still on the driveway or kind of on the edge of the driveway to Officer Edwards' right." [ROA. 1040]. "As soon as [he] addressed her, [Sergeant Cotton] holstered [his] weapon and then was trying to gain her compliance. When Marian Tolan would not comply, Sergeant Cotton "grabbed her right arm, [he] believe with [his]

right hand, and put [his] left hand at the small of her back to start escorting her over to the garage door." [ROA. 1042]. Marian Tolan was talking as Sergeant Cotton was escorting her, and soon after he first touched her, "she flipped her arm up trying to flip my hand off of her and said, 'Get your hands off of me.'" [ROA. 1042].

While he was walking her in the direction of and getting closer to the garage door [ROA. 1043], Sergeant Cotton was gripping her arm, "not as hard as I could, but enough to – to gain control of another person." As he and Marian Tolan moved toward the garage door Sergeant Cotton passed the planter on the porch and got a clearer view of Robbie Tolan lying on the porch. [ROA. 1044]. Officer Edwards was still attempting to "cover" Robbie Tolan and Anthony Cooper until they could be secured. [ROA. 1044-1045]. When Sergeant Cotton and Marian Tolan were almost to the garage door, Sergeant Cotton glanced at Robbie Tolan on the porch and then turned his attention back to Marian Tolan at which point he heard Robbie Tolan yell, "Get your fucking hands off her." When Sergeant Cotton heard Robbie Tolan yell, he also observed Robbie Tolan abruptly getting up and turning toward him. Sergeant Cotton pushed Marian Tolan away from him in order to respond to Robbie Tolan's aggressive movements and to get Marian Tolan out of the way. [ROA. 1045-1046]. Robbie Tolan had been lying down on the porch, hands outstretched toward the front door, but when Sergeant Cotton looked at Robbie Tolan after Robbie hollered "Get your fucking

hands off her," Robbie Tolan "was already partially up" and, by Robbie Tolan's own admission, angrily turning toward Sergeant Cotton. When Sergeant Cotton looked again after hearing him, Robbie Tolan was already getting up, probably halfway up or so, and was turning to his right rotating with his face toward the window. [ROA. 1047]. "When [Sergeant Cotton] first looked, he was – still had his back, for the most part, to [Sergeant Cotton] in the process of rotating" to confront Sergeant Cotton. [ROA. 1047-1048]. After hearing Robbie Tolan yell, Sergeant Cotton turned and saw Robbie Tolan "was up in a crouch kind of in the process of getting up with his feet under him facing kind of away from [Sergeant Cotton] while – as he was rotating to his right." [ROA. 1048-1049]. Sergeant Cotton observed Robbie Tolan's right hand at his waistband as Robbie Tolan was rotating and getting to his feet, but he could not determine where Tolan's left hand was. By "at his waistband," Sergeant Cotton meant "in the middle of his waist," "in the center of his body," "where his belt buckle would be." [ROA. 1049]. Robbie Tolan was wearing a dark, zippered hoodie sweatshirt that was not tucked into his pants. [ROA. 1049]. Sergeant Cotton believed Robbie Tolan was drawing a weapon from his waistband. Sergeant Cotton could not see Robbie Tolan's hand, but could see where Tolan's hand was. The dim lighting allowed Cotton to "see [Tolan's] total movement, which is what made [Sergeant Cotton] believe that [the threat] wasn't necessarily just [based on] where his hand was, for instance." Sergeant Cotton believed Robbie Tolan "was drawing a weapon to shoot [Sergeant

Cotton]." Sergeant Cotton was in fear of his life. As Sergeant Cotton explained it, it was not any one thing that made him afraid, but the "totality of everything that was happening that put [him] in fear, which included the way Robbie Tolan was getting up and where his hand was and – while he was getting up." [ROA. 1052-1053].

SUMMARY OF THE ARGUMENT

The Fifth Circuit did not err in affirming the District Court's dismissal of Tolans' claims and this Court should not exercise its judicial discretion by granting Tolan's petition. The Fifth Circuit decision does not conflict with any decision of another United States court of appeals or this Court. Nor has the Fifth Circuit, in this case, decided an important question of federal law that has not been settled by this Court. The record establishes instead that the Fifth Circuit's well-reasoned decision in favor of Sergeant Cotton is based upon application of the jurisprudence of this Court, as both the District Court and Fifth Circuit opinions plainly reveal.

This Court has long held that analysis of qualified immunity requires examination of those facts necessary to provide the particular context of the case so that evaluation of objective legal reasonableness can reliably be determined and this is the standard the Fifth Circuit applied. The mistake of fact identified by the Fifth Circuit is the type of circumstance

that supports a finding of immunity under this Court's decisions. Contrary to Tolan's argument, the decisions of other circuit courts do not suggest any confusion regarding the proper immunity standard. Some circuits identify the standard for immunity they apply as having two parts and others three but regardless of which elements of the defense are assigned numbers, the analysis each circuit performs is consistent with the dictates of this Court and no circuit has held that qualified immunity must be evaluated without considering relevant facts. The impractical exercise Tolan urges the Court to undertake cannot disprove Sergeant Cotton's qualified immunity. Accordingly, for all these reasons, this Court should deny Tolan's petition.

REASONS FOR DENYING THE WRIT

Although Tolan cites 28 U.S.C. § 1254(1) as a jurisdictional basis for this Court's review, his challenge underscores the reasons for Supreme Court Rule 10, this Court's procedural rule which sets forth the character of reasons considered in determining whether to grant a petition. Rule 10 provides:

> Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (c) . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

SUP. CT. R. 10.

Neither criterion is met here. This case simply presents a circuit court's correct application of well-established legal principles to specific summary judgment evidence in a single case so this Court should deny Tolan's insupportable petition.

I. This Court has long held analysis of qualified immunity requires examination of facts necessary to identify the particular context of the case so that objective legal reasonableness can reliably be evaluated.

Regardless of the procedure used, determination of whether a police officer's action violated clearly established law necessarily requires examination of

the facts that provide the particular context of the case. *See Messerschmidt v. Millender*, ___ U.S. ___, 132 S.Ct. 1235, 1250 (2012). Approximately thirty years ago this Court held "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as **their conduct** does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982) (emphasis added).

In *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038 (1987), after a court of appeals erroneously refused to consider a police officers' contention **his conduct** did not violate a clearly established right, this Court reaffirmed *Harlow*'s dictate that "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2739, assessed in light of the legal rules that were 'clearly established' at the time it was taken, *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738." In *Anderson*, this Court "recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that [their conduct is lawful], and we have indicated that in such cases those officials – like other officials who act in ways they reasonably believe to be lawful – should not be held personally liable." *Anderson*, 484 U.S. at 641, 107 S.Ct. at 3039-3040. "It follows from what [this Court has] said that the determination whether it

was objectively legally reasonable to conclude that a [particular seizure was lawful] will often require examination of the information possessed by the [police officers]. *Id.* "The relevant question in this case, for example, is the objective **(albeit fact-specific)** question whether a reasonable officer could have believed [an officer's seizure] to be lawful, in light of clearly established law and the information the [ ] officers possessed." *Id.* (emphasis added).

In *Saucier v. Katz*, 533 U.S. 194, 197, 121 S.Ct. 2151, 2154 (2001), this Court considered whether, in use of force cases, the determination of qualified immunity is so intertwined with the question of whether a Fourth Amendment violation occurred as to warrant merging the analysis into a single question, as Tolan asks the Court to do. Relying upon firmly established jurisprudence, this Court held "that the ruling on qualified immunity requires an analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest." *Id.* In *Anderson* and *Saucier*, this Court has considered the "surface appeal" of the merger approach but "rejected the argument [Tolan again makes in this case] that there is no distinction between the reasonableness standard [for the underlying constitutional claim] and the qualified immunity inquiry." *Saucier*, 533 U.S. at 202, 121 S.Ct. at 2157.

The basic Fourth Amendment test of *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865 (1989), "does not always give a clear answer as to whether a particular application of force will be deemed excessive

by the courts. This is the nature of a test which **must accommodate limitless factual circumstances.**" *Saucier*, 533 U.S. at 205, 121 S.Ct. at 2158 (emphasis added). "The qualified immunity inquiry, on the other hand, has a further dimension." *Saucier*, 533 U.S. at 205, 121 S.Ct. at 2158. "[I]n excessive force cases, where in addition to the deference officers receive on the underlying constitutional claim, qualified immunity can apply in the event the **mistaken belief** was reasonable." *Saucier*, 533 U.S. at 206, 121 S.Ct. at 2159 (emphasis added). Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes "hazy border between excessive and acceptable force." *Priester v. Riviera Beach*, 208 F.3d 919, 926-927 (11th Cir. 2000), and to ensure that before they are subjected to suit, officers are on notice **their conduct** is unlawful. *Saucier*, 533 U.S. at 206, 121 S.Ct. at 2158 (emphasis added).

Moreover, in *Saucier* this Court re-affirmed the vitality of its holding in *Anderson supra* and restated the criteria for evaluating a claim of immunity. Analysis of immunity requires evaluation of whether the facts show an officer's conduct violated a constitutional right because "[i]f no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity," and if the facts show a constitutional deprivation, whether the facts show the right violated was clearly established. *Saucier*, 533 U.S. at 200-201, 121 S.Ct. at 2155-2156.

In *Saucier*, this Court elaborated on the relevant criteria for determining if police conduct violates clearly established law.[2] "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable." *Saucier*, 533 U.S. at 201, 121 S.Ct. at 2156. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that **his conduct was unlawful in the situation he confronted.**" *Saucier*, 533 U.S. at 202, 121 S.Ct. at 2156 (emphasis added).

Thereafter, in *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808 (2009), this Court directly answered, what was implicit in its prior decisions, the specific question Tolan poses in this case. "The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson*, 555 U.S. at 231, 129 S.Ct. at 815 (quoting *Groh v. Ramirez*, 540 U.S. 551, 567, 124

---

[2] This mere reaffirmation of *Anderson supra*, however, did not invoke any substantive change in this Court's jurisprudence regarding appropriately analyzing the merits of a claim to immunity. *Saucier* did for a time, before this Court decided *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808 (2009), invoke a mere procedural change requiring evaluation of whether a constitutional violation occurred before addressing the substance of the immunity defense.

S.Ct. 1284 (2004) (KENNEDY, J., dissenting) (quoting *Butz v. Economou*, 438 U.S. 478, 507, 98 S.Ct. 2894 (1978), for the proposition qualified immunity covers "mere mistakes in judgment, whether the mistake is one of fact or one of law")). Thus, "'[q]ualified immunity gives government officials breathing room to make reasonable but **mistaken judgments**,' and 'protects all but the plainly incompetent or those who knowingly violate the law.'" *Stanton v. Sims*, ___ U.S. ___, 134 S.Ct. 3, 5 (2013) (quoting *Ashcroft v. al-Kidd*, 563 U.S. ___, 131 S.Ct. 2074, 2085 (2011) also quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092 (1986)) (emphasis added).

In order to deny a police officer's claim to qualified immunity, a court must find that a plaintiff has shown facts which evidence violation of a constitutionally protected right, and additionally shown an officer's conduct violated a clearly established constitutional right. *Pearson*, 555 U.S. at 232, 129 S.Ct. at 816. Determination of whether an officer violated clearly established law "turns on the 'objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.'" *Pearson*, 555 U.S. at 243-244, 129 S.Ct. at 822.

Tolan argues the Fifth Circuit erred in its analysis of this case by labeling its evaluation of the objective legal reasonableness of Sergeant Cotton's action as a separate step in the immunity analysis that allegedly caused an impermissible consideration of facts. *See Tolan*, 713 F.3d at 305. While this Court

has not chosen to identify by separate numeral the required evaluation of objective legal reasonableness of police action assessed in light of the legal rules that were clearly established at the time it was taken, this analysis is nonetheless required under the precedential decisions of this Court. Therefore, whether or not, analysis of objective legal reasonableness is demarcated with its own numbered "step," it must be evaluated to reach an accurate determination of immunity.

Furthermore, the question of immunity is not resolved as Tolan argues by merely *identifying* a constitutionally protected right that could potentially be clearly established, the appropriate standard is whether an accused police officer's actions constituted objectively unreasonable conduct in light of clearly established law at the time of the conduct in question. *See Pearson*, 555 U.S. at 243-244, 129 S.Ct. at 822. This is the standard of this Court the Fifth Circuit applied in this case so the Court should deny Tolan's petition.

II. The Fifth Circuit appropriately evaluated the record in accordance with this Court's standard.

Because this Court has deemed that substantive law identifies the facts that are material in resolving a motion for summary judgment, and only disputes over facts that might affect the outcome of the suit under governing law preclude entry of judgment, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248,

106 S.Ct. 2505, 2512 (1986) and *Krueger v. Fuhr*, 991 F.2d 435, 438 (8th Cir. 1993), "[t]he first step in assessing the constitutionality of [Sergeant Cotton's] actions is to determine the relevant facts," *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769 (2007). This is so regardless of whether the reviewing court chooses to first evaluate the underlying constitutional question or immunity through the application of clearly established law. The substantive law in this case is qualified immunity and immunity cannot be evaluated without consideration of the material factual evidence Tolan asks the Court to disregard. *See Pearson*, 555 U.S. at 243-244, 129 S.Ct. at 822.

Significantly, this case does not involve an interlocutory appeal of denial of summary judgment that would implicate the collateral order doctrine but, instead, this case comes to this Court after a final judgment in which the District Court found no genuine issues of material fact that precluded entry of judgment in favor of Sergeant Cotton on either prong of the qualified immunity analysis. *See Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151 (1995). As such, the District Court's evaluation of the record and identification of the relevant evidence, which the Fifth Circuit Court of Appeals accepted, must not be summarily rejected as Tolan argues.

Oddly, Tolan mischaracterizes his argument as a plea to correct several circuit courts' faulty application of Supreme Court *legal principles*, and argues facts that support immunity are irrelevant, all the while Tolan also argues *facts* that are not supported

by the record and asks this Court to base its decision on his facts. A large portion of Tolan's brief is his argument of the facts when he claims facts cannot appropriately be considered. Tolan is not raising any legitimate legal argument; he is simply asking this Court to view the facts differently than did the District Court and Fifth Circuit.

Assuming *arguendo*, that Tolan actually urges a legal argument; this Court must fundamentally change the qualified immunity standard and adopt a procedure which unreasonably places form over substance, and such an approach is not reconcilable with the manner immunity has ever been evaluated by this Court. While Tolan's claimed theory of liability has taken many forms throughout this litigation, his current petition before this Court rests upon a view allegedly expressed by Justice Sotomayor in *Walczyk v. Rio*, 496 F.3d 139, 165 (2d Cir. 2007), but Tolan's purported reliance is misplaced, not only because Justice Sotomayor's opinion in that case is a minority position, but even more importantly because Tolan ignores the real substance of the Justice's viewpoint, as explained in that decision, that would likely support judgment in Sergeant Cotton's favor.

Notably, the immunity standard used in the Second Circuit is comparable to that which the Fifth Circuit applied and is derived from jurisprudence of this Court. *See Zalaski v. City of Hartford*, 723 F.3d 382, 389 (2d Cir. 2013). The First Circuit, *Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009) (merely changing articulation of the test but retaining the

substance of it); Third Circuit,[3] *Schneider v. Smith*, 653 F.3d 313, 330 (3d Cir. 2011); Fourth Circuit, *Gould v. Davis*, 165 F.3d 265, 269 (4th Cir. 1998); Sixth Circuit, *Hensley v. Gassman*, 693 F.3d 681, 687 n.5 (6th Cir. 2012); Seventh Circuit, *Findlay v. Lendermon*, 722 F.3d 895, 900 (7th Cir. 2013); Eighth Circuit, *Bernini v. City of St. Paul*, 665 F.3d 697, 1002 (8th Cir. 2012); and 11th Circuit, *Wilkerson v. Seymour*, ___ F.3d ___, 2013 WL 6153874 * 2 (2013) join the Second and Fifth Circuits in similarly evaluating claims to qualified immunity in a manner that is consistent with the Supreme Court jurisprudence. Analyses of the decisions of this Court demonstrate that the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Eleventh Circuits are not misinterpreting the legal standard. These circuits are utilizing the standard of clearly established law this Court has set out and they are simply enunciating the multipart standard with greater specificity that provides additional guidance for determining the *relevant particular context* of cases by articulating, what this Court's decisions show relevant to determining *objective legal reasonableness*; application of the

---

[3] Notably, the *Schneider* Court specifically acknowledged the fallacy of the premise of Tolan's argument that the test applied favors police defendants by specifically acknowledging that a plaintiff "can demonstrate that the right was clearly established by presenting a closely analogous case that establishes that the Defendants' conduct was unconstitutional or by presenting evidence that the Defendant's conduct was so patently violative of the constitutional right that reasonable officials would know without guidance from a court." *Schneider*, 653 F.3d at 330.

governing standard consisting of both legal and factual analysis. *See Pierce v. Smith*, 117 F.3d 866, 871-872 (5th Cir. 1997) (applying *Anderson v. Creighton*, 483 U.S. 635, 637-642, 107 S.Ct. 3034, 3038-3040 (1987)). The Fifth Circuit plainly states "[t]he second prong of the qualified immunity analysis is **better understood as** two separate inquiries: whether the allegedly violated constitutional rights were *clearly established at the time of the incident*; and, if so, whether the conduct of the defendants was objectively unreasonable in light of that then clearly established law." *Hare v. City of Corinth*, 135 F.3d 320, 326 (5th Cir. 1998) (emphasis added).

This Court's decisions demonstrate that the clearly-established-law question involves consideration of not only legal concepts but also the factual information necessary to apply those legal concepts in relevant context. The "concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." *Saucier*, 533 U.S. at 205, 121 S.Ct. at 2158 (emphasis added). "It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the **factual situation the officer confronts**." *Id.* (emphasis added). Notably, this Court often uses the phrase "specific context of the case" when addressing the *factual* component of an immunity analysis. *Cf.*, *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 599 (2004). As such, the standard the Fifth Circuit Court applied when evaluating Tolan's appeal comports with this

Court's articulation of the immunity standard and the analysis thereof.

Tolan's petition to this Court essentially stems from two sentences in the Fifth Circuit opinion that followed the thorough, well-reasoned decision of the Court:

> It goes without saying that this occurrence was tragic. But, **the Officer's mistake of fact** and Robbie Tolan's injury do not permit deviating from controlling law.

Tolan, 713 F.3d at 308 (emphasis added).

Notably, the alleged "mistake of fact" cited in the Fifth Circuit's decision was that Robbie Tolan turned out to be unarmed. Other facts the District and Circuit Courts found the record proves are that no reasonable police officer on the scene could have known Tolan was unarmed at the moment Sergeant Cotton fired in self-defense. Prominently, this case does not involve a "mistake" of perception or decision by Sergeant Cotton. The evidentiary record proves Sergeant Cotton made a reasonable decision to fire after observing Tolan's actions that any reasonable police officer could have evaluated as posing an imminent threat of serious injury or death. *See Ontiveros v. City of Rosenberg*, 564 F.3d 379, 383 n.1 (5th Cir. 2009). The Circuit Court based its decision on unrefuted expert testimony of Dr. William Lewinski and Lt. Albert Rodriguez that police "officers cannot be trained to positively identify a weapon before resorting to deadly force" in the fraction of a second required to respond

to Tolan's admittedly angry and aggressive action, and also the established principle that a police officer does not forfeit his qualified immunity when an officer could have reasonably interpreted the perceived threat posed by a suspect sufficient to justify the use of deadly force. *See Ontiveros supra, Thompson v. Hubbard*, 257 F.3d 896, 898-899 (8th Cir. 2001); *Krueger*, 991 F.2d at 439-440; *Ryder v. City of Topeka*, 814 F.2d 1412 n.16 (10th Cir. 1987).

In evaluating circumstances when an officer can reasonably interpret such a threat, the courts have consistently held that when a suspect resists, like the record establishes Robbie Tolan did here, by defying a police officer's commands for reasonable compliance during a police investigation, undertakes action that causes the suspect's hands to be concealed from the investigating officer's view, and thereafter the suspect causes his body, and particularly his hands, to move quickly from a position outside an officer's line of sight toward a police officer, a reasonable police officer may regard such action as posing a potential threat of serious harm to the officer or to others which justifies an officer firing in self-defense, consistent with the practical necessity of defensive action and police training, as the Fifth Circuit found in this case and the Eighth and Tenth Circuits have found in similar circumstances. It is not by happenstance that reasonable police officers fire in response to such threats. The evidence admitted in this case, and similar evidence discussed in prior judicial decisions, demonstrate that an officer who fails to respond decisively

to such threatening actions is leaving his fate to mere chance. *See Ontiveros supra*.

Qualified immunity thus additionally serves to reconcile the practical requirements of a police officer's necessary defensive action and determination of civil liability for reasonable conduct undertaken in uncertain circumstances like those Sergeant Cotton encountered here. This Court has consistently applied the Fourth Amendment and immunity in a manner that is consistent with the needs of a reasonable policeman on the scene. This is the clearly established legal standard the decisions of this Court and the Fifth Circuit embody. *See Brosseau* and *Ontiveros supra*. The "mistake" in this case is, therefore, precisely the type of circumstance that demands a finding of immunity under this Court's decisions as well as those of the circuit courts.

III. Decisions of other circuits do not suggest confusion regarding the immunity standard.

Indeed, even Justice Sotomayor's concurring opinion in *Walczyk* would not suggest otherwise. Although Justice Sotomayor criticized the standard applied in the Second Circuit by drawing an admitted "fine distinction" between it and the approach she endorsed, Justice Sotomayor nonetheless concurred with the majority's grant of summary judgment in favor of police officers who asserted qualified immunity in *Walczyk* based upon the reasonableness of their conduct under the facts presented to them. The Justice

acknowledged in *Walczyk* that "'*Anderson* still operates to grant officers immunity for reasonable mistakes as to the legality of their actions.'" *Walczyk*, 496 F.3d at 168 (quoting *Saucier*, 533 U.S. at 206, 121 S.Ct. at 2151). It is clear Justice Sotomayor agrees that determining whether a right is clearly established requires an analysis of "whether a reasonable officer would have known that the conduct in question was unlawful," and that undoubtedly would have had to consider the factual information known to the officers in *Walczyk* to arrive at her decision regarding immunity in that case. *See Walczyk*, 496 F.3d at 166. The Justice simply opined the Second Circuit erred by allegedly failing to properly articulate the appropriate standard. Regardless of the terms the courts choose to use, a proper evaluation of the qualified immunity defense demands consideration of both legal and factual constituents in all circuit courts.

Tolan, as did Justice Sotomayor in *Walczyk*, also challenges the continued vitality of this Court's holding in *Malley supra* for purposes of evaluating qualified immunity. In *Walczyk*, Justice Sotomayor observed *Malley*'s recitation of the immunity standard had not been repeated by this Court since *Malley* was decided. However, since *Walczyk* was decided, this Court has specifically reaffirmed *Malley*'s pronouncement of immunity for "all but the plainly incompetent or those who knowingly violate the law." *See Morse v. Frederick*, 551 U.S. 393, 429, 127 S.Ct. 2618, 2640 (2009); *Ashcroft v. al-Kidd*, 563 U.S. ___, 131 S.Ct. 2074, 2085 (2011); *Messerschmidt v. Millender*, ___ U.S. ___,

132 S.Ct. 1235, 1245 (2012); and *Stanton v. Sims*, ___ U.S. ___, 134 S.Ct. 3 (2013). As such, that criticism raised in 2007 by Justice Sotomayor has been superceded and Tolan's blind response to it is curious, at best.

As Circuit Judge Raggi explained on behalf of the majority in *Walczyk* in response to Justice Sotomayor's criticisms of the Court's evaluation of clearly established law;

> [b]y instructing courts to focus on whether "officers of reasonable competence could disagree" about the illegality of the challenged conduct, *Malley* sounds a useful reminder: because law enforcement work relies on probabilities and reasonable suspicions in an almost infinite variety of circumstances, many requiring prompt action, there can frequently be a *range* of responses to given situations that competent officers may *reasonably* think are lawful. Within this range, an officer enjoys qualified immunity for "reasonable mistakes."

Walczyk, 496 F.3d at 154 n.16 (quoting *Saucier*, 533 U.S. at 205-206, 121 S.Ct. at 2151). This Court subsequently confirmed Judge Raggi's observation in its later opinions. As such, Tolan's contention the Circuit Court erred by relying on *Malley* is misplaced as well.

Contrary to Tolan's argument, the circuit courts are not divided on the issues he identifies in his petition. Some circuits identify the standard they apply as having two prongs and some three prongs but

regardless of the number of "prongs," the multifaceted analysis each circuit court performs is consistent with that dictated by this Court. Certainly, the Fifth Circuit Court does so as discussed at length *supra*. No circuit has held, as Tolan argues, that qualified immunity must be evaluated without consideration of facts relevant to the immunity analysis.

IV. Any police officer could reasonably have believed Sergeant Cotton's response to Tolan's actions would be permitted under clearly established law.

The District Court and Fifth Circuit have evaluated the evidence admitted into the summary judgment record and determined that Sergeant Cotton is entitled to judgment in his favor because a reasonable police officer could have believed Sergeant Cotton's action was lawful. Although the District Court actually went further and found Sergeant Cotton's *conduct was reasonable*, in light of that finding, an officer certainly could have *reasonably believed* Sergeant Cotton's action was reasonable so immunity is nonetheless appropriate.

Peculiarly, Tolan faults the Fifth Circuit Court for allegedly "inject[ing] merits-related factual reasonableness into the purely legal, second prong immunity analysis," claiming that doing so is prohibited by the decisions of this Court. Contrary to Tolan's argument, however, the decisions of this Court plainly demonstrate the immunity analysis cannot be

competently performed without consideration of those unique facts relevant to the questions underlying the immunity analysis. No discernible authority supports Tolan's assertion that a valid analysis of clearly established law can be undertaken without consideration of the factual circumstances of a claim and this odd argument runs afoul of this Court's holding in every qualified immunity case since *Harlow*.

Prominently, Tolan's novel suggestion would effectively preclude any court's ability to resolve a motion for summary judgment based upon immunity under the second prong of the immunity analysis without first evaluating the facts in the first prong of the immunity analysis, which would undeniably force a conflict with this Court's decision in *Pearson supra*.[4]

Moreover, even if Tolan's argument is accepted and this Court changes the legal standard pertaining to immunity in accordance with Tolan's request, the initial prong of the immunity analysis must still be performed and Sergeant Cotton's conduct evaluated under the facts the District Court found supported by the summary judgment record. Since the District Court and Circuit Court have already found Sergeant Cotton's conduct resulted from a reasonable mistake

---

[4] Presumably, Tolan is also asking the Court to overrule *Pearson* because he makes the same arguments in his petition that lead to the initial decision in *Saucier* to require evaluation of the underlying constitutional issue before any consideration of the effect of clearly established law.

of fact, no doubt he would be granted judgment upon analysis of the first prong test.

But even if not, Sergeant Cotton could not have been on notice that this Court would fundamentally change the immunity standard so his immunity will remain intact. *See Pearson supra*. Even if, as Tolan argues, at least nine circuit courts – including the circuit in which Sergeant Cotton polices – use an invalid test to evaluate immunity, Sergeant Cotton could not reasonably have been on notice through clearly established legal standards that all these circuits incorrectly construed the law applicable to his conduct. *See Pearson*, 555 U.S. at 244-245, 129 S.Ct. at 823. As a matter of equally well-settled clearly established law, Sergeant Cotton would be entitled to judgment in his favor because "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Lane*, 526 U.S. 603, 618, 119 S.Ct. 1692, 1701 (1999). Certainly, Sergeant Cotton could reasonably have believed his conduct was lawful when the District Judge who meticulously scrutinized all the record evidence and the Circuit Court that considered the appeal challenging the District Court's judgment, both ruled in favor of Sergeant Cotton after concluding an officer could reasonably have believed Sergeant Cotton's action lawful. Tolan, thus, urges the Court to substantively change the law to a less efficient procedure that does not preserve the protection of the immunity defense in a manner

consistent with its purpose and will not even likely change the result in this litigation.

The Fifth Circuit Court's decision, as well as its method of analysis, does not conflict with the relevant standard of any other federal circuit or this Court and, to the contrary, it is consistent with the decisions of this Court. While posed as a plea to preserve consistency in judicial decisions, even a cursory analysis reveals, Tolan actually seeks review of the Fifth Circuit decision based upon insupportable argument consisting of self-serving mischaracterizations of the evidence under a claimed legal standard which would ignore the evidence. Such an approach conflicts with the well-reasoned decisions of circuit courts, this Court, and established qualified immunity standards.

CONCLUSION

The District Court correctly determined, and the Fifth Circuit Court of Appeals correctly affirmed, that Sergeant Cotton is entitled to judgment in his favor. Discretionary review is, thus, unwarranted in this case because the Fifth Circuit has not entered a decision which conflicts with any decision of this Court or any other United States court of appeals on the same important matter. To the contrary, Tolan urges this Court to accept the unprecedented notion that qualified immunity must be determined without consideration of the relevant facts. This Court has never

suggested such a standard. For these reasons, this Court should deny Tolan's petition.

Respectfully submitted,

CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & AUGHTRY

WILLIAM S. HELFAND
Counsel of Record
NORMAN RAY GILES
1200 Smith Street, Suite 1400
Houston, Texas 77002-4401
(713) 654-9630
Fax: (713) 658-2553
bill.helfand@chamberlainlaw.com
Attorneys for Respondent

REPLY BRIEF

Supreme Court, U.S.
FILED
JAN - 8 2014
OFFICE OF THE CLERK

No. 13-551

IN THE
Supreme Court of the United States

ROBERT R. TOLAN,

Petitioner,

v.

JEFFREY WAYNE COTTON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN REPLY FOR PETITIONER

MATTHEW D. MCGILL
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

GOUTAM U. JOIS
ILISSA SAMPLIN
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000

MARTIN J. SIEGEL
Counsel of Record
LAW OFFICES OF
MARTIN J. SIEGEL, P.C.
Bank of America Center
700 Louisiana Street
Suite 2300
Houston, TX 77002
(713) 226-8566
Martin@siegelfirm.com

Additional counsel for Petitioner listed inside front cover

GEORGE R. GIBSON
NATHAN SOMMERS JACOBS
2800 Post Oak Boulevard
Houston, TX 77056
(713) 892-4843

TABLE OF CONTENTS

Page

REPLY BRIEF FOR PETITIONER 1

I. THE CIRCUITS ARE IN DISARRAY OVER THE APPROPRIATE QUALIFIED IMMUNITY ANALYSIS 2

II. THE FIFTH CIRCUIT'S THREE-PRONGED IMMUNITY ANALYSIS CONFLICTS WITH THIS COURT'S PRECEDENT 4

III. THIS CASE IS A SOUND VEHICLE FOR ADDRESSING THE PERSISTENT CONFUSION 7

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Butz v. Economou,
438 U.S. 478 (1978) 6, 7

Byers v. City of Eunice,
157 F. App'x 680 (5th Cir. 2005) 4

Crawford-El v. Britton,
523 U.S. 574 (1998) 5

Cunningham v. Gates,
229 F.3d 1271 (9th Cir. 2000) 10

Curry v. City of Syracuse,
316 F.3d 324 (2d Cir. 2003) 10

Feathers v. Aey,
319 F.3d 848 (6th Cir. 2003) 4

Gonzalez v. City of Schenectady,
728 F.3d 149 (2d Cir. 2013) 3, 4

Groh v. Ramirez,
540 U.S. 551 (2004) 7

Hare v. City of Corinth,
135 F.3d 320 (5th Cir. 1998) 5

Harhay v. Town of Ellington Bd. of Educ.,
323 F.3d 206 (2d Cir. 2003) 6

Higgins v. Penobscot Cnty. Sheriff's Dep't,
446 F.3d 11 (1st Cir. 2006) 3, 4, 8

Hilton v. Wright,
673 F.3d 120 (2d Cir. 2012) 3

Hoover v. Walsh,
682 F.3d 481 (6th Cir. 2012).....2

Jefferson v. Lewis,
594 F.3d 454 (6th Cir. 2010).....10

Jones v. Wilhelm,
425 F.3d 455 (7th Cir. 2005).....2, 3

Maldonado v. Fontanes,
568 F.3d 263 (1st Cir. 2009) 3

Okin v. Vill. of Cornwall-on-Hudson Police Dep't,
577 F.3d 415 (2d Cir. 2009) 3

Pearson v. Callahan,
555 U.S. 223 (2009).....3, 5, 6

Phelan v. Vill. of Lyons,
531 F.3d 484 (7th Cir. 2008).....3

Pinter v. City of New York,
710 F. Supp. 2d 408 (S.D.N.Y. 2010).....3

Ribbey v. Cox,
222 F.3d 1040 (8th Cir. 2010).....10

Ricciuti v. Gyzenis,
832 F. Supp. 2d 147 (D. Conn. 2011).....3

Roska v. Peterson,
328 F.3d 1230 (10th Cir. 2003).....2

Saucier v. Katz,
533 U.S. 194 (2001)..... *passim*

Scott v. Harris,
550 U.S. 372 (2007).....6

Taravella v. Town of Wolcott,
599 F.3d 129 (2d Cir. 2010) 3, 4, 8

Walczyk v. Rio,
496 F.3d 139 (2d Cir. 2007) ..... *passim*

White v. Gerardot,
509 F.3d 829 (7th Cir. 2007) 10

Wilson v. City of Boston,
421 F.3d 45 (1st Cir. 2005) 4

Wilson v. City of Des Moines, Iowa,
293 F.3d 447 (8th Cir. 2002) 10

X-Men Sec., Inc. v. Pataki,
196 F.3d 56 (2d Cir. 1999) 6

REPLY BRIEF FOR PETITIONER

There is pervasive division among the lower courts regarding the proper framework for analyzing claims of qualified immunity. Departing from the two-pronged test set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), the Fifth Circuit asks not only whether the plaintiff (i) alleged or demonstrated a constitutional violation and (ii) whether the right in question was clearly established, but also (iii) whether the officer's conduct was nonetheless reasonable.

Some courts use the same approach as the Fifth Circuit, while others have expressly rejected it. Second and Sixth Circuit panels disagree with one another about the appropriate standard in successive cases, and several judges have commented on the ongoing uncertainty facing trial courts and litigants.

This question is not simply semantic, as respondent suggests; the choice of standard dictates the outcomes of cases. Several courts have found that plaintiffs satisfied the traditional two prongs but granted immunity anyway, or (as in this case) bypassed either or both of the first two prongs but bestowed immunity after finding that the defendant's conduct was reasonable.

Respondent defends including the unauthorized third prong on the unremarkable ground that the facts matter when making immunity determinations. But the third prong engrafted by the Fifth Circuit on the *Saucier* test goes beyond simply supplying context to determine whether the applicable law was clearly established; it adds an extra element of factual reasonableness to the legal question of immunity.

Petitioner was misidentified as a car thief and shot on his knees on his own front porch. Because the Fifth Circuit applied the wrong legal standard to respondent's claim of immunity, he was denied a jury trial on his claim that respondent violated his Fourth Amendment rights. This Court should grant the petition to clarify the appropriate legal standard for qualified immunity claims.

I. THE CIRCUITS ARE IN DISARRAY OVER THE APPROPRIATE QUALIFIED IMMUNITY ANALYSIS.

Respondent attempts to minimize the conflict between lower courts by asserting that some merely "enunuciat[e] the multipart standard with greater specificity," using three rather than two prongs. Resp. Br. 28, 34–35. But the circuit split involved here is more than a matter of wording or numbering; it dictates the substance of the immunity analysis and changes the outcomes of cases.

The courts of appeals are unquestionably divided in how they decide immunity claims. *See* Pet. Part II. The Sixth Circuit engages in a reasonableness analysis similar to the Fifth Circuit test, but only in "certain cases." *Hoover v. Walsh*, 682 F.3d 481, 492 n.35 (6th Cir. 2012). The Tenth Circuit uses a reasonableness inquiry as part of its immunity analysis but adds that "a defendant should only rarely be able to succeed" on that basis. *Roska v. Peterson*, 328 F.3d 1230, 1251 (10th Cir. 2003) (citation and internal quotations omitted).

In direct conflict, the Seventh Circuit has specifically declined to "append a third prong to the two-part *Saucier* test." *Jones v. Wilhelm*, 425 F.3d 455, 460–61 (7th Cir. 2005). That court expressly rejected an officer's claim that immunity "should be decided

based on whether police officers acted reasonably under the circumstances they faced" even where "there was clearly established law which was violated." *Id.*; *accord Phelan v. Vill. of Lyons*, 531 F.3d 484, 489 (7th Cir. 2008) (reaffirming *Jones*). The First Circuit does not apply a third, objective reasonableness prong anymore, though it did before this Court's decision in *Pearson v. Callahan*, 555 U.S. 223 (2009). *See Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009).

The Second Circuit reflects the overall confusion. That court has sometimes described the analysis as involving two steps, and other times three. *Compare Hilton v. Wright*, 673 F.3d 120, 126 (2d Cir. 2012) (two steps), *with Gonzalez v. City of Schenectady*, 728 F.3d 149, 154 (2d Cir. 2013) (three steps). It once "clarif[ied]" that the second and third steps are "part of the same inquiry," *Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 433 n.11 (2d Cir. 2009), only to hold later that a separate third step is "indispensable," *Taravella v. Town of Wolcott*, 599 F.3d 129, 135 (2d Cir. 2010). These "inconsistent directives" to the district courts, *Pinter v. City of New York*, 710 F. Supp. 2d 408, 423 (S.D.N.Y. 2010), *rev'd*, 448 F. App'x 99 (2d Cir. 2011), led one to lament that the circuit's "qualified immunity case law is itself not 'clearly established.'" *Ricciuti v. Gyzenis*, 832 F. Supp. 2d 147, 162 n.2 (D. Conn. 2011)

Several judges have acknowledged the disarray in this area. *See, e.g.*, *Walczyk v. Rio*, 496 F.3d 139, 165 (2d Cir. 2007) (Sotomayor, J., concurring); *Higgins v. Penobscot Cnty. Sheriff's Dep't*, 446 F.3d 11, 15 (1st Cir. 2006) (Howard, J., concurring). Indeed, "[t]he case law is divided, not only in [the Second] Circuit, but also in courts around the country."

Taravella, 599 F.3d at 138 n.2 (Straub, J., dissenting).

Respondent insists that the division among the courts of appeals is merely cosmetic, Resp. Br. 33, but the presence of the third "reasonableness" prong can dictate the outcome of cases by "giv[ing] defendants a second bite at the immunity apple." *Walczyk*, 496 F.3d at 169 (Sotomayor, J., concurring). Under the three-pronged test, a court might find a violation of clearly established rights but nevertheless still conclude that immunity applies because the officer's conduct appears to be "reasonable" in some generic sense. *See, e.g.*, *Gonzalez*, 728 F.3d at 155–58; *Taravella*, 599 F.3d at 134–35; *Wilson v. City of Boston*, 421 F.3d 45, 52–59 (1st Cir. 2005); *Byers v. City of Eunice*, 157 F. App'x 680, 682–85 (5th Cir. 2005); *Feathers v. Aey*, 319 F.3d 848, 848–51 (6th Cir. 2003). In addition, adding a third step to the analysis could complicate decisions on injunctive relief, making the issue more than "merely theoretical." *Higgins*, 446 F.3d at 17 (Howard, J., concurring).

II. THE FIFTH CIRCUIT'S THREE-PRONGED IMMUNITY ANALYSIS CONFLICTS WITH THIS COURT'S PRECEDENT.

This Court has never suggested that a third, reasonableness prong is included in the qualified immunity analysis. Yet the Fifth Circuit used this third step to engage in a lengthy factual examination of whether it was reasonable for respondent to shoot petitioner. Respondent defends this approach by maintaining that the facts provide necessary context to determining whether the plaintiff's rights were clearly established under the second prong of the *Saucier* analysis. Resp. Br. 19–26, 29, 35–36. But the Fifth Circuit's approach does more—it adds a

third step, ad hoc reasonableness test at odds with this Court's authority. *See Walczyk*, 496 F.3d at 168-69 (Sotomayor, J., concurring).

This Court explained in *Saucier* that qualified immunity is analyzed in two steps: whether the plaintiff has alleged or shown a constitutional violation, and whether the right in question was clearly established. 533 U.S. at 201. In this case, the first prong hinges on whether the officer used reasonable force in light of the threat on the scene, while immunity "has a further dimension"—whether he reasonably gauged "the legal constraints" on his conduct. *Id.* at 205. Immunity applies "[i]f the officer's mistake as to what the law requires is reasonable." *Id.* In other words, the second prong of the immunity analysis contemplates assessing the "objective *legal* reasonableness" of the defendant's conduct. *Pearson*, 555 U.S. at 244 (emphasis added) (citation and quotation omitted); *see also Crawford-El v. Britton*, 523 U.S. 574, 589 (1998) (stating that the second prong "is an essentially legal question" (citation and internal quotations omitted)). There is no free-floating third step centered on factual reasonableness.

Nonetheless, the Fifth Circuit bifurcated the second prong and imported factual reasonableness into the immunity analysis as a third step.[1] As the panel observed:

---

[1] The Fifth Circuit's third step, like those of other circuits, seems to stem from improper reliance on circuit precedent that predates, and conflicts with, *Saucier*. *See, e.g.*, Pet. App. 10 (citing *Hare v. City of Corinth*, 135 F.3d 320, 326 (5th Cir. 1998)); *Harhay v. Town of Ellington Bd. of Educ.*, 323 F.3d 206, 211–12

[Footnote continued on next page]

> To be sure, it was clearly established that shooting an unarmed, non-threatening suspect is a Fourth–Amendment violation. *But, that is only half of the equation for second-prong analysis*; the remainder depends upon the totality of the circumstances as viewed by a reasonable, on-the-scene officer without the benefit of retrospection.

Pet. App. 14 (emphasis added) (internal citations omitted); *see also* Pet. App. 10 (describing second prong's "two separate inquiries" (citation and quotation omitted)). This third "half of the equation" has nothing to do with whether respondent misjudged applicable law or lacked fair warning of Fourth Amendment principles. Instead, the Fifth Circuit "slosh[ed] . . . through the factbound morass of 'reasonableness,'" *Scott v. Harris*, 550 U.S. 372, 383 (2007), and granted immunity based on "the reasonableness of [respondent's] belief as to the appropriate level of force." *Saucier*, 533 U.S. at 205. Once the Fifth Circuit "determine[d] whether the right at issue was clearly established for the particular context that the officer faced, the qualified immunity analysis [should have been] complete." *Walczyk*, 496 F.3d at 167 (Sotomayor, J., concurring).[2]

[Footnote continued from previous page]
(2d Cir. 2003) (citing *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 65–66 (2d Cir. 1999)).

[2] Respondent quotes *dicta* from *Pearson* that immunity applies whether the error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." Resp. Br. 23 (quoting *Pearson*, 555 U.S. at 231). The phrase originated in *Butz v. Economou*, 438 U.S. 478, 507 (1978), and was para-

[Footnote continued on next page]

The "dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. In other words, "whether a right is clearly established is *the same question* as whether a reasonable officer would have known that the conduct in question was unlawful." *Walczyk*, 496 F.3d at 166 (Sotomayor, J., concurring) (emphasis in original). "[A]dditional guidance" in the form of a third reasonableness inquiry, Resp. Br. 28, has no basis in this Court's jurisprudence and offers judges license to resolve disputed factual questions that properly rest with juries.

III. This Case Is A Sound Vehicle For Addressing The Persistent Confusion.

The state of the law governing qualified immunity is muddled across the circuits for two independent reasons. First, several courts erroneously add the

---

[Footnote continued from previous page]
phrased in *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting). But in *Butz* and *Groh*, the violation did not turn on whether an official acted unreasonably given surrounding facts. *See Butz*, 438 U.S. at 482; *Groh*, 540 U.S. at 554–59; *id.* at 573 (Thomas, J., dissenting) ("[T]he Court declines to perform a reasonableness inquiry."). In Fourth Amendment cases where the violation consists of factually unreasonable conduct, this Court has specifically held that the second step looks distinctly at whether the defendant reasonably misjudged the law. *See Saucier*, 533 U.S. at 204–06. Moreover, *Groh* makes clear that "[i]f the law [i]s clearly established, the immunity defense ordinarily should fail" without a separate, ad hoc inquiry into factual reasonableness. 540 U.S. at 563–64 (citation and quotation omitted).

third, reasonableness step to the immunity inquiry in all types of civil rights cases. In cases alleging violations of constitutional provisions other than the Fourth Amendment, the third step becomes an untethered, all-purpose reasonableness inquiry that improperly entitles defendants to immunity irrespective of whether reasonableness is an element of the underlying alleged violation. *See, e.g.*, *Taravella*, 599 F.3d at 135–36 (due process context). Second, this additional step is "especially [problematic] in Fourth Amendment cases" because courts use it to collapse the two traditional steps of the analysis despite *Saucier's* instruction. *Higgins*, 446 F.3d at 15–17 (Howard, J., concurring). This case is therefore an appropriate vehicle both to reiterate the appropriate framework governing qualified immunity and to reemphasize that the two prongs remain distinct in Fourth Amendment cases. *Saucier*, 533 U.S. at 203–04.

Further percolation is unnecessary. Courts like the Fifth and Sixth Circuits have acknowledged and reaffirmed their three-step tests even after *Saucier*. *See supra* Part I. Other courts, such as the First and Seventh Circuits, have expressly rejected applying the third step. *See id.* Still others, including the Second Circuit, acknowledge that they use a third step but allow the confusion to persist from case to case, perplexing district courts. *See id.* The division among the circuits is well developed and entrenched. There is no reason for this Court to defer resolution of this persistent controversy.

Because the Fifth Circuit applied an incorrect legal standard, respondent ultimately resorts to defending the shooting on the facts. He claims that because he "made a reasonable decision to fire after ob-

serving petitioner's actions," he would "be granted judgment upon analysis of the first prong" of qualified immunity even if the Fifth Circuit misconceived the second prong. Resp. Br. 30, 36–37. Not likely.

The key facts of the encounter are sharply disputed. Respondent claims that the scene was "fairly dark" and that this led him to focus on petitioner's "total movement" rather than his hand—but petitioner and his mother testified that the scene was adequately illuminated and that respondent should have been able to see what was happening. *Compare* Resp. Br. 13, 16, *with* Pet. App. 96. Respondent claims that petitioner's mother was moving around, disruptive, "argumentative," "upset," and "flipped her arm up" to move his—but she testified that she was calmly talking with the other officer on the scene when respondent slammed her into the garage door without provocation. *Compare* Resp. Br. 14–15 (citation and quotation omitted), *with* Pet. App. 41, 96–98. Respondent claims that petitioner was in a crouch, "angrily turning" toward him, and poised to charge forward—but petitioner testified that he was on his knees and "didn't jump up off the ground. I just simply got up. Started to get up. Before I could stand up, I was shot." *Compare* Resp. Br. 16, *and* Pet. App. 49–50, 52, *with* Pet. App. 75 (internal citations and quotations omitted). Most importantly, respondent claims that he saw petitioner's right hand "at his waistband" and thought he was drawing a gun—but petitioner testified that he did not gesture toward or away from his waist. *Compare* Resp. Br.

16, *with* Pet. App. 76, 98, 102 ("I didn't run at him. I didn't jump up and make any crazy movements.").[3]

Factual disputes like these, particularly when centered on parties' differing accounts of whether a suspect made a motion that could be construed as reaching for a weapon, are typically grounds for denying summary judgment.[4] Nor is respondent's expert testimony that officers "cannot be trained to positively identify a weapon before resorting to deadly force" dispositive. Resp. Br. 30 (citation and quotation omitted). Petitioner has never maintained

---

[3] Respondent charges petitioner with relying on evidence ruled inadmissible by the district court, Resp. Br. 2–3, but he points to a page in the petition citing the opinion by Judge Dennis. *See id.* at 4. Regardless, the facts discussed in the petition and Judge Dennis's opinion are drawn from the testimony of various witnesses and other testimony by petitioner, not his excluded affidavit, and can all be found in the opinions below. *See* Pet. 5–7; Pet. App. 2–6, 23–53. Moreover, petitioner did challenge exclusion of the affidavit in the court of appeals. Appellants' Br. 33 n.6.

[4] *See, e.g.*, *Ribbey v. Cox*, 222 F.3d 1040, 1042–43 (8th Cir. 2010) (dispute over whether suspect reached for gun); *Jefferson v. Lewis*, 594 F.3d 454, 461–63 (6th Cir. 2010) (dispute over whether suspect pointed object at officer or merely gripped doorknob); *White v. Gerardot*, 509 F.3d 829, 834–35 (7th Cir. 2007) (dispute over whether suspect's hands were at waist motioning as if reloading); *Curry v. City of Syracuse*, 316 F.3d 324, 333–34 (2d Cir. 2003) (dispute over whether suspect reached for weapon in sock); *Wilson v. City of Des Moines, Iowa*, 293 F.3d 447, 452–54 (8th Cir. 2002) (dispute over whether suspect assumed shooting stance and reached into waistband); *Cunningham v. Gates*, 229 F.3d 1271, 1288–89 (9th Cir. 2000) (dispute over whether suspect reached toward waistband).

that officers must wait until they see a suspect wield a weapon before shooting.

* * *

The Fifth Circuit's use of the third step—employed by other circuits as well—cannot be squared with this Court's longstanding precedent. This case is a sound vehicle to clear up the confusion among the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MATTHEW D. MCGILL
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

GOUTAM U. JOIS
ILISSA SAMPLIN
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000

MARTIN J. SIEGEL
Counsel of Record
LAW OFFICES OF
MARTIN J. SIEGEL, P.C.
Bank of America Center
700 Louisiana Street
Suite 2300
Houston, TX 77002
(713) 226-8566
Martin@siegelfirm.com

GEORGE R. GIBSON
NATHAN SOMMERS JACOBS
2800 Post Oak Boulevard
Houston, TX 77056
(713) 892-4843

Counsel for Petitioner

January 8, 2014

AMICUS CURIAE BRIEF

MOTION FILED
DEC 2 6 2013
RECORDS AND BRIEFS

No. 13-551

IN THE
Supreme Court of the United States

ROBERT R. TOLAN,

Petitioner,

v.

JEFFREY WAYNE COTTON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

SHERRILYN IFILL
Director-Counsel
CHRISTINA SWARNS
JOHANNA STEINBERG
JIN HEE LEE
VINCENT SOUTHERLAND
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND
40 Rector St., 5th Floor
New York, NY 10006
(212) 965-2200

ANTHONY S. BARKOW*
ERIC DEL POZO
REID A. ARONSON
NATALIE K. ORPETT
JENNER & BLOCK LLP
919 Third Ave.
New York, NY 10022
(212) 891-1622
abarkow@jenner.com

**Counsel of Record*

MOTION OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2, the NAACP Legal Defense & Educational Fund, Inc. ("LDF"), respectfully requests leave to file the attached brief *amicus curiae* in support of Petitioner Robert R. Tolan. Petitioner has consented to the filing of the brief. Respondent has not consented to the filing of the brief.

LDF is the nation's first civil rights law firm. LDF was founded as an arm of the NAACP in 1940 by Charles Hamilton Houston and Thurgood Marshall to redress injustice caused by racial discrimination and to assist African Americans in securing their constitutional and statutory rights. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans and to break down barriers that prevent African Americans from realizing their basic civil and human rights.

As described more fully in the accompanying brief *amicus curiae*, LDF has a longstanding concern with the influence of race on the administration of the criminal justice system and with laws, policies, and practices that impose a disproportionately negative impact on communities of color. Thus, LDF recently called on the United States Congress to address Stand Your Ground laws, which have proven to be uniquely vulnerable to racial bias, by requiring training of state and local law enforcement, implementa-

tion of violence-reduction strategies, and collection and reporting of data regarding the laws' application. LDF also has served as counsel of record and *amicus curiae* in federal and state court litigation challenging the arbitrary role of race in capital sentencing, the influence of race on prosecutorial discretion, the correlation between felon disenfranchisement, racial bias, and racial disproportionality in the criminal justice system, and the discriminatory use of peremptory challenges.

In this case, the events underlying Petitioner's Fourth-Amendment claim of excessive force under 42 U.S.C. § 1983 highlight the potential influence of subconscious stereotypes falsely associating race with criminality, aggression, and violence on decisions whether to use defensive deadly force. Whether the assailant is a police officer, or a private citizen "standing his ground," such implicit bias has repeatedly led to the unjustified use of lethal force against young African-American men. Not considering this phenomenon, the United States Court of Appeals for the Fifth Circuit awarded Respondent qualified immunity from liability in a decision that was both legally and factually flawed. Moreover, because the Fifth Circuit's decision conflicts with this Court's precedents regarding the test for qualified immunity and broadens the defense beyond proper limits, *amicus* has an interest in having that decision corrected.

For the foregoing reasons, *amicus* can bring an important perspective to the issues before this Court and respectfully requests that leave to file the attached brief *amicus curiae* in support of the petition for *certiorari* be granted.

Respectfully submitted,

SHERRILYN IFILL
Director-Counsel
CHRISTINA SWARNS
JOHANNA STEINBERG
JIN HEE LEE
VINCENT SOUTHERLAND
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND
40 Rector St., 5th Floor
New York, NY 10006
(212) 965-2200

ANTHONY S. BARKOW*
ERIC DEL POZO
REID A. ARONSON
NATALIE K. ORPETT
JENNER & BLOCK LLP
919 Third Ave.
New York, NY 10022
(212) 891-1622
abarkow@jenner.com

Counsel of Record

December 26, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Fifth Circuit Incorrectly Added a Third Step to the Court's Two-Step Qualified-Immunity Test 5

A. The Properly Viewed Facts 5

B. The Fifth Circuit Incorrectly Modified the Qualified-Immunity Standard. 6

C. The Fifth Circuit's Application of Its Modified Qualified-Immunity Standard Resulted in Material Error. . 10

D. The Court Should Remedy The Fifth Circuit's Misapplication of Qualified Immunity To Promote Fair Adjudication of Civil Rights Claims..... 16

II. The Fifth Circuit's Errors Magnify the Potential Impact of Implicit Bias on the Events at Issue. 19

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Anderson v. Creighton, 483 U.S. 635 (1987).... 8, 10

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)..... 5

Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011)..... 3, 7, 11, 16

Bailey v. Pataki, 708 F.3d 391 (2d Cir. 2013)..... 9

Blakely v. Washington, 542 U.S. 296 (2004) 18

Brosseau v. Haugen, 543 U.S. 194 (2004)..... 8

Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525 (1958) 18

CarePartners, LLC v. Lashway, 545 F.3d 867 (9th Cir. 2008)..... 9

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)..... 24

Graham v. Connor, 490 U.S. 386 (1989) 7, 12, 24

Harlow v. Fitzgerald, 457 U.S. 800 (1982)..... 3, 4, 7

Hope v. Pelzer, 536 U.S. 730 (2002) 11

Jennings v. Jones, 499 F.3d 2 (1st Cir. 2007)..... 17

Jones v. Wilhelm, 425 F.3d 455 (7th Cir. 2005)..... 9

Ludwig v. Anderson, 54 F.3d 465 (8th Cir. 1995)..... 16

Maldonado v. Fontanes, 568 F.3d 263 (1st Cir. 2009)..... 9, 17

McSurely v. McClellan, 697 F.2d 309 (D.C. Cir. 1982) 18

Messerschmidt v. Millender, 132 S. Ct. 1235 (2012) 8

Pearson v. Callahan, 555 U.S. 223 (2009) 6, 7

Reichle v. Howards, 132 S. Ct. 2088 (2012) 11

Quigley v. Tuong Vinh Thai, 707 F.3d 675 (6th Cir. 2013) 9

Saucier v. Katz, 533 U.S. 194 (2001) ..... *passim*

Scott v. Harris, 550 U.S. 372 (2007) 12

State v. Henderson, 27 A.3d 872 (N.J. 2011) 22

Taravella v. Town of Wolcott, 599 F.3d 129 (2d Cir. 2010) 17, 18

Tennessee v. Garner, 471 U.S. 1 (1985) 10, 15

Walczyk v. Rio, 496 F.3d 139 (2d Cir. 2007) 8, 9, 16

Young v. Conway, 698 F.3d 69 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 20 (2013) 22

STATUTES

42 U.S.C. § 1983 3

OTHER AUTHORITIES

Henk J. Brands, *Qualified Immunity and the Allocation of Decision-Making Functions Between Judge and Jury*, 90 Colum. L. Rev. 1045 (1990) 17

Joshua Correll, *et al.*, *The Police Officer's Dilemma: Using Ethnicity To Disambiguate Potentially Threatening Individuals*, 83 J. Personality & Soc. Psychol. 1314 (2002) 22

Kenneth A. Deffenbacher, *et al.*, *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Hum. Behav. 687 (2004) 22

Patricia G. Divine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. Personality & Soc. Psychol. 5 (1989) 21

Jennifer L. Eberhardt, *et al.*, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psychol. 876 (2004) 21

Susan T. Fiske & Shelley E. Taylor, Social Cognition (2d ed. 1991) 19

Anthony G. Greenwald, *et al.*, *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. Experimental Soc. Psychol. 399 (2003) 22

Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 Psychol. Sci. 640 (2003) 21

Daniel Kahneman, Thinking, Fast and Slow (2011) 19, 23

Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489 (2005) 20, 21, 24

Ziva Kunda, Social Cognition: Making Sense of People (1999) 19

Kevin N. Ochsner & Matthew D. Lieberman, *The Emergence of Social Cognitive Neuroscience*, 56 Am. Psychologist 717 (2001) 21

B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. Personality & Soc. Psychol. 181 (2001) 21

L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 Iowa L. Rev. 293 (2012) 20, 23

Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Sci. 1124 (1974) 20, 23

INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF"), is the nation's first civil rights law firm. LDF was founded as an arm of the NAACP in 1940 by Charles Hamilton Houston and Thurgood Marshall to redress injustice caused by racial discrimination and to assist African Americans in securing their constitutional and statutory rights. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights.

LDF has a longstanding concern with the influence of race on the administration of the criminal justice system and with laws, policies, and practices that impose a disproportionately negative impact on communities of color. Thus, LDF recently called on the United States Congress to address Stand Your Ground laws, which have proven to be uniquely vulnerable to racial bias, by requiring training of state and local law enforcement, implementation of violence-reduction strategies, and collection and reporting of data regarding the laws' application. *See* Letter from Sherrilyn Ifill, President and Director-

---

[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for both parties received notice of *amicus curiae*'s intention to file this brief at least 10 days prior to the due date. Petitioner consented to the filing of this brief, and his letter of consent has been filed with the Clerk. No party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

Counsel, NAACP Legal Defense & Educational Fund, Inc., to the United States Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Human Rights (Oct. 29, 2013) (on file with author).

LDF also has served as counsel of record and *amicus curiae* in federal and state court litigation challenging the arbitrary role of race in capital sentencing, *see McCleskey v. Kemp*, 481 U.S. 279 (1987); *Furman v. Georgia*, 408 U.S. 238 (1972); the influence of race on prosecutorial discretion, *see United States v. Armstrong*, 517 U.S. 456 (1996); *United States v. Bass*, 266 F.3d 532 (6th Cir. 2001); the correlation between felon disenfranchisement, racial bias, and racial disproportionality in the criminal justice system, *see Farrakhan v. Gregoire*, 590 F.3d 989 (9th Cir. 2010); and the discriminatory use of peremptory challenges, *see Miller-El v. Dretke*, 545 U.S. 231 (2005); *Johnson v. California*, 545 U.S. 162 (2005); *Batson v. Kentucky*, 476 U.S. 79 (1986).

Given its expertise in matters concerning the influence of race on the operation of the justice system, LDF believes its perspective would be helpful to the Court in resolving the issues presented by this case.

SUMMARY OF ARGUMENT

In his own driveway, suspected of having stolen his own car, and despite verification of his residency and innocence from his middle-aged parents who had exited their home wearing their pajamas, unarmed Petitioner Robbie Tolan was shot at three times and grievously injured by Respondent Sergeant Jeffrey Cotton. Sergeant Cotton had been at the scene for

just 32 seconds before drawing and discharging his weapon in this near-fatal shooting. Misstating the law and improperly construing the facts, a panel of the Court of Appeals for the Fifth Circuit held Sergeant Cotton immune from liability for excessive force under 42 U.S.C. § 1983. *See* Petitioner's Appendix ("Pet. App.") 12.

The Court should grant the Petition for a Writ of *Certiorari* ("Pet.") in this case to clarify the appropriate qualified-immunity standard for claims of unreasonable search or seizure in violation of the Fourth Amendment. As set forth therein, *see* Pet. 10–19, the Fifth Circuit's decision leaves the relevant standard in disarray and perpetuates a split of authority among the Courts of Appeal on the proper articulation and application of the second qualified-immunity question, which asks whether the constitutional or statutory "right [at issue] was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

Despite this Court's consistent endorsement of a qualified-immunity test with "two prongs," *id.*, the Fifth Circuit divided the second prong into "two separate inquiries: whether the allegedly violated constitutional rights were clearly established at the time of the incident; and, if so, whether the defendant's conduct was objectively unreasonable in the light of that then clearly established law." Pet. App. 10; *see also id.* at 14 (calling identification of "clearly established" legal rule "only half of the equation for second-prong analysis"). The panel then

shoehorned an unbridled and subjective reasonableness determination into the newly invented third immunity prong and resolved contested questions of fact against the non-movant on summary judgment. *See* Pet. 25–27.

Neither the shooting of Robbie Tolan nor the decision depriving him of a jury determination of the legality of that shooting finds support in the law. The panel decision makes it onerously difficult to surmount a qualified-immunity defense and usurps the jury function in excessive-force cases. The goal of qualified immunity is to protect officials from liability for reasonable mistakes in novel situations, *see Harlow*, 457 U.S. at 819, not to wrest otherwise worthy cases from juries in a manner that insulates the actions of law enforcement from review.

These errors are particularly problematic where, as here, indicia of racial bias taint the underlying facts. Specifically, without warning, a police officer shot an unarmed person of color—who was wrongly suspected of vehicle theft—simply for shouting at the officer and beginning to get up from a prone position in response to the officer's manhandling of the victim's mother. *See* Pet. App. 6, 11, 14–15. In assessing Sergeant Cotton's conduct "from the perspective of a reasonable officer on the scene" tasked with making a split-second decision whether to use deadly force, *id.* at 12 (quotation marks omitted), the Court of Appeals did not consider the influence of subconscious stereotypes falsely associating race with criminality, aggression, and violence. Whether the assailant is a police officer, or a private citizen "standing his ground," such implicit

bias has repeatedly led to the unjustified use of lethal force against young African-American men—as occurred here.

Accordingly, the Court should grant *certiorari* to remedy the multiple errors in the Fifth Circuit's decision and to clarify the law in this important area.

ARGUMENT

I. The Fifth Circuit Incorrectly Added a Third Step to the Court's Two-Step Qualified-Immunity Test.

A. The Properly Viewed Facts.

In ruling on a motion for summary judgment, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* Properly viewed under these standards, the record evidence in this case revealed as follows:

Robbie Tolan was pulling into his driveway with his cousin when he was approached by a police officer (Officer John Edwards) who had incorrectly run the vehicle's license plate number, prompting suspicion that the car was stolen. Pet App. 25–26, 64–65. After the pair had exited the vehicle, the officer ordered them to get on the ground. *Id.* at 27. At some point, responding to a call for backup, a second officer (Sergeant Cotton) arrived on the scene. *Id.* at 28, 65. Hearing the commotion outside, Robbie Tolan's parents (Mr. and Mrs. Tolan) came out of the

house in their pajamas and told the young men to follow the officer's orders. *Id.* at 11, 27–28, 65, 97. They did. *Id.* at 27–28.

Mr. and Mrs. Tolan then calmly explained to the officers that they had lived in the home for 15 years, that the suspected auto thieves were actually not thieves but their son and nephew, and that they owned the putatively stolen car. *Id.* at 5, 65–66, 97. Instead of de-escalating the situation based on this new information, one of the officers slammed Mrs. Tolan against the house's garage door, at which point her son sat up and yelled at the officer. *Id.* at 70, 75–76, 98. Without warning—and only 32 seconds after arriving on the scene—the officer whose job was to provide backup drew his gun and shot Robbie Tolan in the chest, collapsing his lung. *Id.* at 6, 42, 98. Robbie Tolan did not reach into or towards his waistband before being shot. *Id.* at 11, 80.

These facts, when viewed in light of the applicable law, do not justify the Fifth Circuit's qualified-immunity determination.

B. The Fifth Circuit Incorrectly Modified the Qualified-Immunity Standard.

This Court's qualified-immunity jurisprudence is clear and well developed. "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Accordingly, "government officials performing discretionary

functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. Correctly applied, the defense "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *al-Kidd*, 131 S. Ct. at 2085.

In *Saucier v. Katz*, 533 U.S. 194 (2001), *modified in part by Pearson*, 555 U.S. at 236, the Court delineated two questions that control the qualified-immunity analysis:

One, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* at 201.

And two, did "the law clearly establish[ ] that the officer's conduct was unlawful in the circumstances of the case"? *Id.*; *see Pearson*, 555 U.S. at 236 (holding that questions may be answered in any order).

An excessive-force determination turns on reasonableness. *See, e.g.*, *Graham v. Connor*, 490 U.S. 386, 396 (1989). So too does the second prong of the qualified-immunity analysis, which asks whether a reasonable officer would have appreciated that "his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. Crucially, however, "[t]he inquiries of qualified immunity and excessive force remain distinct." *Id.* at 204. Evaluating clearly established law based on the circumstances an officer

confronted simply connects the legal standard to the facts to aid in articulating the implicated right. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."); *see also, e.g.*, *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1245 (2012) (reiterating second step's concern with "the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken" (quotation marks omitted)); *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (reducing immunity inquiry to whether officer "reasonably misapprehend[ed] the law governing the circumstances she confronted").

Nothing in *Saucier* or this Court's decisions since, however, permits "bifurcation of the 'clearly established' analysis" into distinct components, "divorcing the reasonableness inquiry from the state of the law at the time of the conduct in question." *Walczyk v. Rio*, 496 F.3d 139, 167 (2d Cir. 2007) (Sotomayor, J., concurring). With good reason: as then-Judge Sotomayor has warned, "introducing reasonableness as a separate step" impermissibly "permit[s] courts to decide that official conduct was 'reasonable'" irrespective of whether "it violated clearly established law." *Id.* at 168–69. It thus "give[s] defendants a second bite at the immunity apple, thereby thwarting a careful balance that" this Court has struck between vindication of private rights and performance of public duties. *Id.* at 169.

Nevertheless, the Fifth Circuit here divided the second, "clearly established" qualified-immunity

prong in just such a fashion. *See* Pet. App. 10 ("The second prong of the qualified immunity test is . . . understood as two separate inquiries . . . ." (quotation marks omitted)).[2] In the panel's view, that "it was clearly established that shooting an unarmed, non-threatening suspect is a Fourth-Amendment violation" was "only half of the equation for second-prong analysis; the remainder depends upon the totality of the circumstances as viewed by a reasonable, on-the-scene officer without the benefit of retrospection." *Id.* at 13–14. This misstatement created an illegitimately broad zone of immunity for the defendant, at once promoting casual treatment of the record evidence, treading on the jury's realm, and sowing confusion in the law to the detriment of civil rights plaintiffs. *See infra* Parts I.C–D. In short, it had "real consequences" on the outcome of this case, *Walczyk*, 496 F.3d at 168 (Sotomayor, J., concurring), as it will on future cases.

---

[2] Courts in the Second, Sixth, and Ninth Circuits have similarly bifurcated the "clearly established" prong. *See Bailey v. Pataki*, 708 F.3d 391, 404 n.8 (2d Cir. 2013); *Quigley v. Tuong Vinh Thai*, 707 F.3d 675, 680 n.2 (6th Cir. 2013); *CarePartners, LLC v. Lashway*, 545 F.3d 867, 876 & n.6 (9th Cir. 2008). Other Circuits apply the prong faithfully. *See Jones v. Wilhelm*, 425 F.3d 455, 460–61 (7th Cir. 2005) (rejecting addition of third *Saucier* prong that would make "reasonableness of an official's actions an independent factor in determining whether a right is clearly established"); *see also Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009).

C. The Fifth Circuit's Application of Its Modified Qualified-Immunity Standard Resulted in Material Error.

As Judge Dennis aptly noted in dissent from the denial of rehearing *en banc*, the panel's second-prong *Saucier* misadventure resulted in a "confused jumble of parts of each prong," leading to the incorrect application of "either prong of the *Saucier* analysis." Pet. App. 93. Indeed, rather than look to the circumstances Sergeant Cotton confronted to determine whether the involved right was clearly established, *see Anderson*, 483 U.S. at 640, the panel examined the factual record to determine whether, in light of clearly established law, the officer nevertheless acted reasonably in the broadest imaginable sense. This was error.[3] Given "the situation he confronted," *Saucier*, 533 U.S. at 202, Sergeant Cotton's alleged actions contravened clearly established law.

In fact, the panel correctly recognized "that shooting an unarmed, non-threatening suspect is a Fourth Amendment violation." Pet. App. 14 (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)). At that point, the inquiry was complete: on Robbie Tolan's account (and in reality), Sergeant Cotton shot "an unarmed, non-threatening suspect." *Id.*

---

[3] The panel also misstated the "the first prong of the qualified-immunity analysis" as requiring injury "result[ing] from the use of force that was clearly excessive to the need and . . . the excessiveness of which was clearly unreasonable." Pet. App. 9 (quotation marks omitted). Such error highlights the perils of the Court's tolerating continued distortion of *Saucier*'s prongs.

In concluding that immunity was warranted, however, the panel did not meaningfully distinguish *Garner*'s facts. *See, e.g.*, *Saucier*, 533 U.S. at 202 (holding "clearly established" inquiry informed by whether prior cases are "distinguishable in a fair way from the facts presented in the case at hand"). Nor did the panel survey case law to judge whether Sergeant Cotton had "fair warning" that the level of force used was excessive under the circumstances. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *see id.* at 753 (Thomas, J., dissenting) ("In conducting this inquiry, it is crucial to look at precedent applying the relevant legal rule in similar factual circumstances."); *see also Reichle v. Howards*, 132 S. Ct. 2088, 2093–96 (2012) (surveying law of this Court and of Courts of Appeal in analyzing whether proposed right to freedom from retaliatory arrest based on probable cause was "clearly established"); *al-Kidd*, 131 S. Ct. at 2083 (focusing "clearly established" inquiry on "existing precedent," which "must have placed the statutory or constitutional question beyond debate").

Instead, the panel determined whether the force used by Sergeant Cotton was reasonable—or, in other words, not excessive—as a matter of second-step, qualified-immunity law.[4] It premised that analysis on the *Graham v. Connor* directive that force's excessiveness "be judged from the perspective

---

[4] While the analysis resembled that of *Saucier*'s first step, the panel expressly declined to "reach whether Sergeant Cotton's shooting Robbie Tolan violated his Fourth Amendment right against excessive force." Pet. App. 17.

of a reasonable officer on the scene." 490 U.S. at 396. *Graham* involved an arrest during an investigatory stop, however, and not a police shooting. Thus, while its general principles endure, its specific factual context is of "scant applicability to" a police shooting case. *Scott v. Harris*, 550 U.S. 372, 381–83 (2007); *cf. Saucier*, 553 U.S. at 201–02 (observing that *Graham* alone furnishes insufficient guidance for evaluating clarity of implicated right in excessive-force cases).[5]

This errant analysis produced a conclusion that Sergeant Cotton did not, in fact, face "an unarmed, *non-threatening* suspect." Pet. App. 14 (emphasis added). Someone in Sergeant Cotton's position, held the panel, could reasonably have believed that Robbie Tolan "presented an immediate threat to the safety of the officers." *Id.* (quotation marks omitted). In so deciding, however, the panel did not construe the evidence in the light most favorable to the non-movant, as it was required to do on summary judgment. It largely did the opposite.

First, the panel unjustifiably "resolv[ed] material facts genuinely at issue in the defendant's favor rather than in favor of the plaintiff." *Id.* at 99. Specifically, the panel:

- despite Robbie Tolan's testimony that the area was "reasonably well-lit," *id.* at 4, by floodlights over the garage, a lantern in the yard, and a police car and flashlight, *id.* at 96, described the area as "dimly-lit," *id.* at 14;

---

[5] Nor does *Graham* set forth any pertinent principle of qualified immunity. *See* 490 U.S. at 399 n.12.

- despite testimony that Mrs. Tolan "was calm and merely explained to both officers that she and her husband owned the Nissan and house and that Robbie lived there with them," *id.* at 96; *see id.* at 30–31, 41, concluded that Mrs. Tolan "refus[ed] orders to remain quiet and calm," *id.* at 15;
- ignored testimony that Sergeant Cotton "shoved" Mrs. Tolan into the garage, *id.* at 38, producing a "loud noise," *id.* at 31, or a "big bang," *id.* at 39, and instead opined that Sergeant Cotton used "minimal physical force to move [Mrs.] Tolan away from Officer Edwards' line of sight," *id.* at 18; and
- rejected testimony and physical evidence supporting a finding that Robbie Tolan had not moved towards Sergeant Cotton before being shot, *see id.* at 31–36, 71, in stating that Robbie Tolan had "abruptly attempt[ed] to approach Sergeant Cotton," *id.* at 16.

Second, the panel improperly "dismiss[ed]" certain material "facts as inconsequential." *Id.* at 99. For example, the panel:

- decided that whether Robbie Tolan reached for his waistband was immaterial, *id.* at 15, despite noting the conflicting testimony in this regard, *see id.* at 6, 11, and also pointing out that Robbie Tolan was wearing a "'hoodie'" that "conceal[ed] his waistband," *id.* at 6;
- failed to consider a reasonable officer's reaction to Mr. and Mrs. Tolan's explanation that their vehicle was *not* stolen, *see id.* at 5,

in light of the young men's compliance with the directions of law enforcement in response to the Tolans' instructions, *see id.* at 3–4, while stressing Officer Edwards's error in mistyping the vehicle's license plate number into a search database, which led the officers to "believe they were dealing with a felony vehicle theft," *id.* at 11;

- without relaying that two of the identified persons were middle-aged and wearing pajamas and that the other two were prone on the ground, relied on the fact that the officers were "outnumbered on the scene" by four other persons, *id.* at 15.

Third, the panel drew unwarranted evidentiary inferences for the movant and advanced those inferences as historic fact. For instance, the panel:

- failed to acknowledge that Sergeant Cotton's aggression towards the Tolans might have stirred confrontation, *see* Pet. App. 30–31, 96, and simply declared the scene outside the Tolan home "chaotic and confusing," *id.* at 4;
- foreclosed the inference that Sergeant Cotton was unreasonable in ignoring Mrs. Tolan's "protestations" that "the car was not stolen, and [that] they had lived in the house for 15 years," *id.* at 5, and instead ruled that Sergeant Cotton was "[j]ustified in his believing [that] Robbie Tolan . . . had stolen a vehicle," *id.* at 14;
- inferred that Mrs. Tolan's "demeanor" (again, the subject of a factual dispute) "frustrated"

Sergeant Cotton's ability to secure the scene, *id.* at 5;

- deemed Robbie Tolan's message to Sergeant Cotton to "get your fucking hands off my mom!" not an appropriately upset plea to unhand the speaker's mother, *see id.* at 31, but a "verbal[ ] threat," *id.* at 14; and
- construed Robbie Tolan's pushing himself up to his knees and turning around not as a son's attempting to assess his mother's safety, but as his "moving to intervene" in Sergeant Cotton's police work, *id.* at 12.

A glaring example of factfinding by the panel occurred in its cursory discussion of the *Tennessee v. Garner* requirement of "some warning," whenever "feasible," before an officer may shoot even a "suspect [who is] threaten[ing] the officer with a weapon." 471 U.S. at 11–12. The panel inferred a "clear and obvious warning" from the officers' communicating their belief that the Tolans' vehicle was stolen and from Sergeant Cotton's drawing "his pistol upon his arriving on the scene." Pet. App. 16. *But see id.* at 36 (testimony of Robbie Tolan that Sergeant Cotton unholstered his weapon and discharged it "practically immediately" thereafter); *id.* at 105–06 (testimony of Mrs. Tolan that Sergeant Cotton "didn't say a word" before firing). Even assuming that identifying a vehicle as stolen and drawing a weapon might satisfy *Garner*, the efficacy of such an implied warning and whether "absence of a final warning . . . exacerbate[d] the circumstances" are

quintessential jury questions. *Ludwig v. Anderson*, 54 F.3d 465, 474 (8th Cir. 1995).

Given the material disputed facts, the panel could not have properly resolved whether Sergeant Cotton acted reasonably under *Garner*—and, indeed, it expressly elected not to do so—under the first *Saucier* step. Yet it nonetheless injected improper factfinding into the second qualified-immunity prong, which solely concerns identifying whether the pertinent legal rule is clearly established. The panel's treatment of the record evidence is a byproduct of, and inseparable from, its flawed articulation of the qualified-immunity test.

D. The Court Should Remedy The Fifth Circuit's Misapplication of Qualified Immunity To Promote Fair Adjudication of Civil Rights Claims.

The challenged panel decision sets a dire precedent, realizing previously expressed concerns over a three-pronged qualified-immunity test. *See Walczyk*, 496 F.3d at 168–69 (Sotomayor, J., concurring). The point of qualified immunity is to protect reasonable official activity where the governing constitutional or statutory law is not clearly established. *See, e.g., al-Kidd*, 131 S. Ct. at 2083–84. It is not to provide "breathing room" for police to shoot unarmed people of color without fear of repercussions in cases where courts honor the police version of events. *Id.* at 2085.

The panel decision also sows needless confusion in the law, to the detriment of civil rights plaintiffs. Surmounting a qualified immunity defense should

not be made onerously difficult. "[F]ormulating the inquiry as both a two- and three-step analysis," however, risks that courts, as here, "will interpret the third step—the 'objective reasonableness' inquiry—as a hurdle that is somehow distinct from, and in addition to, the 'reasonableness' inquiry that is already a part of the second step." *Taravella v. Town of Wolcott*, 599 F.3d 129, 138 (2d Cir. 2010) (Straub, J., dissenting). That distinct and additional hurdle proved dispositive here. Indeed, the First Circuit, which "abandon[ed] previous usage of a three-step analysis," *Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009), has noted the "added measure of protection provided by the third prong of the qualified immunity analysis," *Jennings v. Jones*, 499 F.3d 2, 19 (1st Cir. 2007) (quotation marks omitted).

Finally, just as pernicious, the panel's distortion of the second qualified-immunity step from *Saucier* will encourage usurpation of the jury's function in excessive-force cases. The putative third *Saucier* step on summary judgment invites impermissible examination and characterization of the record evidence regarding the particular circumstances an officer confronted, to determine whether the officer acted reasonably despite allegedly violating clearly established law. *Cf.* Henk J. Brands, Qualified Immunity and the Allocation of Decision-Making Functions Between Judge and Jury, 90 Colum. L. Rev. 1045, 1059 (1990) (stating that conflating "any qualified immunity inquiry in[to] terms of what a reasonable person would have known or believed" presents "arguably a question for the jury"). Adding

a third "reasonableness" layer to qualified immunity thus invites judges to substitute their own experiences and sympathies for those of the jury in assessing the reasonableness (or unreasonableness) of the defendant's conduct as a matter of law.

Here, the panel's foray into factfinding contravened the bedrock principle that "[w]hen considering a motion for summary judgment, a trial court's function is to ascertain whether disputed facts exist, not to try them." *McSurely v. McClellan*, 697 F.2d 309, 321 (D.C. Cir. 1982) (per curiam). Other courts may read the panel decision as license to misapply the second *Saucier* step in similar fashion. *See Taravella*, 599 F.3d at 138 (Straub, J., dissenting). Moreover, if the outer boundary of step-two factual "reasonableness" exceeds that of step-one factual "reasonableness," as is likely, then fewer excessive-force cases will be submitted to juries and more will be decided by courts. Such an outcome must be prevented "to give intelligible content to the right of jury trial," which is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004) (making point in sentencing context); *see Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 540 (1958) (affirming longstanding "federal practice of jury determination of disputed factual issues," including those relating to immunity defenses); *see also* Pet. 22–23 and sources cited.

II. The Fifth Circuit's Errors Magnify the Potential Impact of Implicit Bias on the Events at Issue.

The Fifth Circuit's misapplication of qualified immunity is particularly troublesome where, as here, the facts suggest that unconscious bias may have influenced the actions of law enforcement. As has been recounted, Sergeant Cotton wrongly suspected Robbie Tolan of having stolen his own vehicle, despite verification of his innocence from his pajama-clad parents. Sergeant Cotton then shot an unarmed Robbie Tolan—who, in light of the facts presented and inferences as they must be drawn at summary judgment, did not motion towards his waistband or present any sort of threat—in asserted self-defense. *See* Pet App. 6, 11, 14–15. Sergeant Cotton's perception of danger where none actually existed suggests the taint of unconscious bias.

Scientific research spanning decades establishes that much of how we think, behave, and judge the world around us is influenced by mental processes that occur automatically. We employ these processes by necessity—our brains are constantly inundated by stimuli that must be processed, interpreted, and recorded into memories, often instantaneously. To permit us to function, our brains must condense and simplify this flood of information.[6]

---

[6] Researchers describe this constellation of mental processes variously as "heuristics," *e.g.*, Daniel Kahneman, Thinking, Fast and Slow (2011); "schemas," *e.g.*, Susan T. Fiske & Shelley E. Taylor, Social Cognition (2d ed. 1991); and "concepts," *e.g.*, Ziva Kunda, Social Cognition: Making Sense of People (1999).

Although these mental shortcuts are often accurate and efficient means of processing information, they also produce errors in judgment that affect understanding and cognition. *See* L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 Iowa L. Rev. 293, 298 (2012); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Sci. 1124, 1124–31 (1974). These errors—known as "implicit biases"—are systemic and widespread: whatever we think we think, implicit bias contaminates our perceptions and judgments.

Because implicit bias, by definition, occurs unconsciously, psychologists and other social scientists have developed special testing methods to understand its contours. The "state-of-the-art" Implicit Association Test—examining how tightly subjects associate any two concepts with one another—is the most common and well-established mechanism for measuring implicit bias. Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489, 1508–11 (2005) (describing implicit-association testing methods and "dissociation between explicit self-reports and implicit measures" of bias).

The results of these tests are sadly predictable. Although implicit bias may take many forms, it is most pervasive along racial lines and, as empirical studies have demonstrated, it is particularly acute against African Americans. These studies have shown that individuals quickly match "black" or "African-American" with widely held negative stereotypes like violence, dangerousness, and criminality. *See, e.g.*, Jennifer L. Eberhardt, *et al.*,

Seeing Black: Race, Crime, and Visual Processing, 87 J. Personality & Soc. Psychol. 876, 876 (2004).

Accordingly, individuals are more likely to perceive ambiguously aggressive behavior of an African-American than of a white person as a threat. *See* Patricia G. Divine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. Personality & Soc. Psychol. 5 (1989); *see also* Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 Psychol. Sci. 640, 643 (2003) (concluding that individuals are more likely to perceive hostility in African-American faces than in white faces). Brain-mapping functional magnetic resonance imaging (fMRI) tests have evidenced significantly greater activation in the part of the brain involved in fear conditioning and perception of threatening stimuli when white study participants are subliminally shown African-American faces than when they are shown white faces. *See, e.g.*, Kang, *Trojan Horses of Race*, *supra*, at 1510–11; Kevin N. Ochsner & Matthew D. Lieberman, *The Emergence of Social Cognitive Neuroscience*, 56 Am. Psychologist 717, 720 (2001).

Perhaps most disturbing, studies have specifically demonstrated that individuals are more likely to perceive guns (as opposed to tools) in the hands of African Americans than white people. *See* B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. Personality & Soc. Psychol. 181, 183–86 (2001); Eberhardt, *et al.*, *Seeing Black*, *supra*, at 889–90.

Likewise, when tasked with deciding whether or not to shoot a target in a video game depending on whether the target is carrying a gun (as opposed to a wallet, soda can, or cell phone), individuals are both more likely and quicker to shoot unarmed African-American targets than they are unarmed white targets. *See* Anthony G. Greenwald, *et al.*, *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. Experimental Soc. Psychol. 399, 403 (2003); Joshua Correll, *et al.*, *The Police Officer's Dilemma: Using Ethnicity To Disambiguate Potentially Threatening Individuals*, 83 J. Personality & Soc. Psychol. 1314, 1319 (2002).

Moreover, as the Second Circuit noted in *Young v. Conway*, 698 F.3d 69 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 20 (2013), an extensive body of scientific literature "indicates that certain circumstances surrounding a crime," which include "the stress of the situation," and "the cross-racial nature of the crime . . . may impair the ability of a witness . . . to accurately process what she observed," *id.* at 78–79 (citing studies in vacating criminal conviction on habeas review).[7] Similarly, scientists have proven that high levels of stress produce a defensive mental state, which results in diminished capacity to process or to remember events accurately. *See* Kenneth A. Deffenbacher, *et al.*, *A Meta-Analytic Review of the*

---

[7] This literature has been peer-reviewed, replicated, and retested; it is considered the "gold standard in terms of the applicability of social science research to the law." *Young*, 698 F.3d at 79 (quotation marks omitted); *see also State v. Henderson*, 27 A.3d 872 (N.J. 2011).

Effects of High Stress on Eyewitness Memory, 28 Law & Hum. Behav. 687, 699 (2004).

Some decisions are more prone to bias, however, than others. Researchers like Nobel Prize-winner Daniel Kahneman have demonstrated that human beings use two cognitive systems to interpret information and stimuli. *See* Daniel Kahneman, Thinking, Fast and Slow (2011); Tversky & Kahneman, *Judgment Under Uncertainty*, *supra*, at 1124–31. The first of these, "System 1," governs the split-second judgments we make using mental shortcuts like heuristics. As shown, System 1 thinking is prone to systemic errors like implicit bias against African Americans. The second cognitive system, "System 2," employs the self-reflective, deliberative processes of critical thinking. In other words, "System 1 provides snap judgments and offers a form of rough-and-ready, bias-prone thinking that leans heavily on factual context and previously held beliefs. System 2 kicks in after a time delay and corrects errors." Richardson & Goff, *Self-Defense*, *supra*, at 301 (quotation marks omitted).

Line-level law enforcement officers rely on System 1 thinking to navigate the emergent and potentially dangerous situations they face every day. Indeed, their profession demands it. Thus, Fourth Amendment decisional law provides substantial leeway for mistaken snap judgments. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the

amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396–97.

The leeway afforded to snap judgments, however, cannot be absolute, especially given the potential for action that is biased and wrong. "[T]o counter otherwise automatic behavior, one must accept the existence of the problem in the first place." Kang, *Trojan Horses of Race*, *supra*, at 1529. Thus, courts should scrutinize for signs of implicit bias where, as here, the evidence prompts "suspicion" that official decision-making was influenced by "impermissible assumptions" or "invidious stereotypes." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 464–65 (1985) (Marshall, J., concurring in part and dissenting in part); *see also id.* at 471 ("Where such constraints . . . are present, and where history teaches that they have systemically been ignored, a 'more searching judicial inquiry' is required." (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)). At a minimum, assiduous application of the proper qualified-immunity and summary-judgment standards is vital: the broader the unearned leeway for defendants, the longer these important issues may remain unresolved.

Here, Sergeant Cotton's evaluation of the scene, prompting the use of lethal force in asserted self-defense, may have been shaped by the implicit biases just described. Indeed, despite other evidence to the contrary, Sergeant Cotton testified that he thought an unarmed "Robbie Tolan was pulling a weapon from his waistband area." Pet. App. 72; *see id.* at 50, 81–84, 86–88, 104. Rather than subject this claim to careful analysis or admit the possibility

that Sergeant Cotton was unreasonably mistaken, the panel dismissed the asserted waistband-reach as immaterial, relying on other, more tenuous circumstances to support its decision—*i.e.*, that Robbie Tolan "verbally threatened" the officer and that he "did a push-up maneuver." *Id.* at 14–15. Respectfully, such a decision lacks justification and threatens to bring the law into disrepute.

CONCLUSION

The established practice of "doubling the 'objectively reasonable' inquiry" in excessive force cases already "holds large potential to confuse." *Saucier*, 533 U.S. at 210–11 (Ginsburg, J., concurring). Tripled, the inquiry becomes inscrutable. This is especially ominous where, as here, the influence of subconscious stereotypes falsely associating race with criminality, aggression, and violence may have led to the unjustified use of lethal force against an unarmed young African-American man.

For the foregoing reasons, *amicus* urges the Court to grant the Petition for a Writ of *Certiorari*.

Respectfully submitted,

SHERRILYN IFILL
Director-Counsel
CHRISTINA SWARNS
JOHANNA STEINBERG
JIN HEE LEE
VINCENT SOUTHERLAND
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND
40 Rector St., 5th Floor
New York, NY 10006
(212) 965-2200

ANTHONY S. BARKOW*
ERIC DEL POZO
REID A. ARONSON
NATALIE K. ORPETT
JENNER & BLOCK LLP
919 Third Ave.
New York, NY 10022
(212) 891-1622
abarkow@jenner.com

Counsel of Record

December 26, 2013